Elements of Equity

ELEMENTS OF EQUITY

INTRODUCTORY.

CHAPTER I

THE NATURE AND ORIGIN OF EQUITY.

Definition In the most general sense, we call that "equity," which, in human transactions, is founded in natural justice, in honesty and right.

But a large portion of natural justice is not of a nature to be judicially enforced, from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of enforcing duties of an imperfect obligation—e.g. charity, gratitude, kindness, and so forth. Therefore equity may be defined as that portion of natural justice which is capable of being judicially enforced

But as the Common law of England was also based on natural justice, equity may be defined as *that portion of natural justice which is capable of being judicially enforced, but which the Common law of England did not enforce, and which was, on that account, enforced by the Chancellor.*

"Equity" defined.

Nature of Equity. Formerly, from the paucity of precedents, Courts of equity exercised an unbounded jurisdiction, of correcting, controlling and even superseding the law and of enforcing natural rights, thus meriting Selden's spirited rebuke that "the standard of equity was variable as the measure of the Chancellor's foot." But now a Court of equity is as much bound by settled rules and precedents as a Court of law.

Now equity is bound by settled rules.

History of equity in England

Origin of Equity in England. In the Anglo-Saxon times, as well as in the early days of the Conquest, justice was administered by local Courts, presided over by laymen, who, owing to their ignorance of legal principles, had to depend blindly on precedents. They were thus incapable of coping with the progress of the nation In course of time, however, professional judges, versed in Roman law, were appointed, and to meet the demands of justice, sometimes borrowed from the storehouse of Roman law, and supplied the limitations of the indigenous law. If nothing untoward had happened, the Common law would have continued to be nourished by Roman equity, and law and equity would have blended together and grown as an organic whole under the Common law Courts. But several causes operated to prevent this importation of Roman equity into Common law, and necessitated the establishment of a separate Court of equity.

Causes which prevented the importation of Roman equity :—

(a) Conservatism of the early judges.

The first cause was the extreme conservatism of the early judges. Instead of moving with the progress of the people, the judges preferred to remain where

their ancestors were, and opposed any attempt to introduce any new juristic task.

(2) Nature of early English law—prominence of feudalism.

The second cause was the nature of the primitive law. The law of real property, as well as of personal status and relations, was largely dependent on, and connected with, feudal law; and no two things in the world are more antagonistic to each other than feudalism and Roman law. A combination of the two was almost impossible, and the nature and temper of the English judges was not such as to attempt this task.

(3) The reformation.

The third cause was the growth of Protestantism. For a long time there was a conflict between the English sovereign and the Pope; and the people began to lose faith in Roman religion, as well as in Roman law. Partly on account of its name, partly because it was supported by the church, and partly because of the growth of the spirit of liberty, Roman law began to be regarded as an instrument of Popish oppression, and came into popular disfavour. Thus the barons solemnly enacted that they would not suffer the country to be governed by the Roman law, and the judges prohibited it from being referred to in the Courts. The result was, as we shall see, directly the reverse of what they intended.

Need of improvement in early law.

The above causes arrested the growth of the Common law by an assimilation of Roman equitable principles; and, on the other hand, the early actions and procedure stood badly in need of improvement.

Early actions and procedure.

For instance, the early procedure furnished a fixed

number of forms of action. Generally speaking, the forms were of two classes. The first was called Real Actions, including a considerable number of particular actions, some for determining title, and others for recovery of possession merely. Though these actions afforded a somewhat full remedy, they were excessively cumbrous and arbitrary in their modes of procedure. There was, moreover, no action of ejectment. But the lack of remedies was felt chiefly in the class of personal actions. Torts were without any legal remedy, unless accompanied by violence; and breaches of contract were outside the pale of the law. The remedies granted were also primitive. The judgment, when given in favour of the plaintiff, was a recovery of the land, or a recovery of the chattels, or a recovery of a sum of money. There was no room for specific performance, injunction, appointment of a receiver, or such other complete relief. Moreover, every wrong was supposed to fall within some particular class, and for every class an appropriate remedy existed, called a writ or *breve*. The writ was the first step in every action; and if the plaintiff, who was to choose the appropriate writ, made any error therein, he lost his case.

The Statute "In Consimili Casu",

These defects of the judicial system were attempted to be cured by a statute of Edward I, "In Consimili Casu" (13 Ed. I Stat. 1), which empowered the Chancery clerks to draw up a new writ, on an occasion "where in one case a writ is found, and in a *like* case falling under *like* law and requiring *like* remedy is found none." The judges, by their highly narrow

construction, nullified the intention of the above statute. For instance, they refused to be concluded by the new writ as framed by the Chancery clerks; they tried the legality of the same, and not infrequently, rejected it. In the second place, a *like* remedy could only be awarded, that is to say, all remedies other than the recognized three *viz.*, recovery of land, of chattels, or of a sum of money, were denied. Thirdly, entirely new facts and circumstances were held to be outside the scope of the statute, because they did not fall under *like* law. Lastly, the statute was construed as being solely in favour of the plaintiff; defendants were not allowed to raise new pleas in defence. All these circumstances made the establishment of a new Court necessary, which would grant relief in cases where the Common law Courts granted none; and such a Court was found in the Chancellor, who was, from the earliest times, a Common law Court of no mean importance.

proved ineffectual.

Separate Court of equity became necessary.

From the earliest times, the king, who was conceived to be "the fountain of justice," had an indefinite jurisdiction in *extraordinary* cases. Whenever a fair and impartial trial could not be expected from the ordinary tribunals, by reason of the defendant's position, or from the heinousness of the offence, or in cases of fraud, deceit or dishonesty, the only course open to the aggrieved party was to petition the king, who decided the case with the help of his Council. Afterwards, when from the pressure of affairs of state, the King could not personally exercise this jurisdiction, called

The Chancellor—growth of his jurisdiction.

the *prerogatives of grace*, he used to delegate such matters to the keeper of his conscience *viz.*, the Chancellor, to be decided by him according to justice, equity and good conscience. In course of time, the Chancellor exercised this extraordinary jurisdiction as a matter of course, without much objection, for he was a Common law judge as well as a high ecclesiastic, versed in both Roman Law and Canon Law. From his position, therefore, he was eminently fitted to introduce salutary changes without innovations, and he vigorously exercised this extensive jurisdiction without much opposition, except from Common law judges, when he interfered with a matter falling within the jurisdiction of the latter. The Chancellor at first professed to exercise his jurisdiction with the tacit leave of the Crown, but in the reign of Edward III, the legislature empowered him to grant relief in extraordinary cases.

The Chancellor's jurisdiction recognized by legislature.

Judicature Act: fusion of law and equity.

Supreme Court of Judicature.

Equity thus grew and continued to flourish exclusively under the Chancellor, and side by side with the Common law Courts; and in 1873, law and equity were fused together by the Judicature Act. By that Act, the Court of Chancery, Courts of Common law, and the Courts of Probate, Divorce and Admiralty were amalgamated together, and became the Supreme Court of Judicature, which now consists of two divisions—the High Court of Justice and the Court of Appeal. All Courts were empowered to administer law and equity together, with a direction that if there is a conflict between a rule of law and a rule of equity, the rule of equity shall prevail.

The effect of the Judicature Act is thus nominally to abolish the Court of Chancery as an exclusive Court of equity; but the old Court of Chancery still subsists as the Chancery Division of the High Court of Justice to whose exclusive cognizance is now assigned, by sec 34 of the Judicature Act, the following matters:—

Exclusive jurisdiction of the Chancery Division.

1. Administration.
2. Partnerships.
3. Mortgages and charges.
4. Sale of property subject to charge.
5. Trusts, private and public.
6. Rectification and cancellation of documents.
7. Specific performance of contracts.
8. Partition of real property.
9. Guardianship of infants

and several other matters.

Division of Equity Jurisdiction. Before the Judicature Act of 1873, it was usual to divide equity jurisdiction into three classes:—(1) *exclusive*, (2) *concurrent* and (3) *auxiliary*.

Equity jurisdiction:—

1. In the exercise of *exclusive* jurisdiction, the Chancellor gave relief in respect of *equitable* rights, as opposed to *legal* rights, which were protected by Courts of law. Thus the *equitable* right of the *cestui que trust*, the *equity* of redemption of a mortgagor, the *equitable* rights of married women and so forth were protected by the Chancellor in the exercise of this jurisdiction.

(1) Exclusive jurisdiction —equitable rights.

2. The *concurrent* jurisdiction embraced two classes of cases:—

(2) Concurrent jurisdiction —legal rights,

and equitable remedies,

(*a*) Those cases in which the right to be enforced was a legal one, but for which the remedy granted by Courts of law was totally inadequate, and the Chancellor granted adequate relief. Thus the Common law could merely grant compensation; but equity could order specific performance, injunction, reformation, and so forth.

or legal remedies granted easily.

(*b*) Those in which the right was a legal one and the remedy in equity was substantially the same as that granted by Courts of law, but which was granted by the Courts of law in an indirect manner, or through a multiplicity of suits. Here equity granted the remedy in a direct manner, or in one and the same suit. Instances of the former are to be found in cases of mistake, accident, fraud etc. Thus where a contract for the sale of land has been entered into under mistake or fraud, the promisor may, at law, resist a suit for damages for breach of the contract; but in equity the promisor may sue for cancellation or rectification of the instrument embodying the contract. Instances of the latter are found in suits of interpleader, accounts, partition, set-off, partnership and so forth.

(3) Auxiliary jurisdiction —merely in aid of pro-

3. The *auxiliary* jurisdiction embraced matters in respect of which the equity jurisdiction was exercised solely in *aid* (auxilium) of certain actions or

proceedings which belonged exclusively to Courts of law. In all proceedings which belong to this jurisdiction, no relief is either asked for or granted; their sole object is the obtaining or preserving of evidence to be used upon the trial of some action at law. For instance, A brings an action against B at law. B is hampered in his defence in consequence of there being some important matter of evidence within the particular knowledge of A; B therefore brings a bill against A in the Court of Chancery, requiring A to state (or *discover*) on oath the matters within his knowledge. The suit in Chancery is terminated when such evidence is procured; and the evidence so received may be used at the trial in a Court of law. This is called a bill of *Discovery*.

ceedings at law,

e. g., discovery.

The effect of the Judicature Act is thus ostensibly to abolish the exclusive jurisdiction, by making it concurrent in all cases; but as a matter of fact, the Chancery Division has now, by virtue of sec. 34, exclusive jurisdiction in the matters specified above. But the auxiliary jurisdiction has been really abolished, because the functions of the auxiliary jurisdiction are now exercised by all Courts, and no suitor need come into equity for that.

CHAPTER II.

THE MAXIMS OF EQUITY.

No wrong without a remedy :

I. No wrong without a remedy: *Ubi jusibi remedium* :—Whenever a right has been infringed, a remedy will be given. The maxim is the source of the entire equity jurisprudence, exclusive, concurrent and auxiliary; it finds its development in the whole body of doctrines and rules which define and regulate the equitable jurisdiction as distinct from the jurisdiction at law.

but not where the right is not recognised by law or equity.

The generality of this maxim must be accepted with one important limitation, *viz.*, that equity cannot interfere to give any remedy, unless the right in question, the invasion of which constitutes the wrong complained of, is one which is capable of being judicially enforced. "Equity does not attempt, any more than the law, to deal with obligations and corresponding rights which are *purely* moral, which properly and exclusively belong to the tribunal of conscience."

But where a person's right is capable of being judicially enforced, but which the law would not enforce, or where a person has a legal remedy, but cannot obtain it owing to a technical defect, equity will trustee.

Illustrations.

(*a*) *A cestui que trust* was not recognized at law, but he was considered in equity the owner of the property. Therefore equity granted remedy to the *cestui que trust* in case of a breach of trust by the trustee.

(*b*) A mortgagor, during the continuance of the mortgage, was considered in equity the owner of the property, and could, in equity, sue for the land or for the rent thereof, even though the mortgagee was possessed of the legal estate.

(*c*) Under the Common law, an instrument under seal could only be discharged by another instrument of a similar character, or else by a surrender thereof. Therefore, a debtor under seal who had paid off the debt in full, but had neglected to obtain a release or a surrender of the instrument, had no defence in law; but if the creditor had brought an action in law on such a deed, equity restrained him by an injunction from prosecuting the suit.

(*d*) By the common law, the creditor on a sealed instrument, which had been lost or destroyed, could not sustain an action on it. Equity, however, granted him relief, by enforcing the demand. *

Equity follows the law :—

II. Equity follows the law: *Æquitas sequitur legem*:—Equity follows the law, in the sense of obeying it, conforming to its general rules and policy, whether contained in the Common law or in the Statute law. As Lord Chancellor Talbot observed:—"Where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this Court to take it up where the law leaves it, and to extend it further than the law allows."

This maxim has two different applications, according as it is applied to (A) the originally *concurrent* jurisdiction (legal rights but equitable remedies) or

* In India, the creditor of a lost negotiable instrument can maintain an action on it after giving security. Civil Procedure Code (V of 1908) O. 7. R. 16.

(B) to the originally *exclusive* jurisdiction (equitable rights).

in concurrent jurisdiction,

(A) As regards legal estates, rights and interests, equity is strictly bound by the rules of law,—e. g., the rules of descent or intestate succession, primogeniture for instance, even, though it might be attended with the utmost hardship to the younger sons. Similarly, in the exercise of the concurrent jurisdiction, equity rigidly follows the rules of limitation, neither extending nor limiting it. And equity, while following the law, may avoid its effect.

Illustrations.

(*a*) The eldest son prevents the father from making a will in favour of the younger sons, by fraudulently representing to him that he will himself convey the estate to his brothers after he has inherited it. The estate descends to the eldest son, who refuses to make the conveyance. Equity, while declining to interfere with his title by primogeniture, will hold him a trustee for the younger sons.

(*b*) Similarly, a testator in advanced years induced his niece to reside with him and look after him on the representation that he had given her a legacy by the will, which he has in fact done. He subsequently revoked the will by a codicil, and died. Equity would not interfere with the revocation (because, in law, a will is revocable), but would hold the heir-at-law a trustee to the niece to the extent of her legacy.

and in exclusive jurisdiction.

(B.) In the case of equitable estates, though not strictly bound by the rules of law, equity generally acted in analogy with law.

Illustration.

In the exercise of its exclusive jurisdiction, equity never

tolerated laches on the part of a person having a mere equitable right. Acting on this principle, equity sometimes goes even further than the law, and would refuse relief to such a person on the ground of delay, even though he comes within the statutory period.

Equal equities, first in time prevailing.

III. Where there are equal equities, the first in time shall prevail: *Qui prior est tempore, potior est jure*:—This maxim has often been misunderstood; it cannot be better stated than in the words of V-C. Kindersley in *Rice* v. *Rice*:— "As between persons having only equitable interests, if their interests are *in all other respects* equal, priority in time gives the better equity.....In a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; *i. e.*, a Court of equity will not prefer the one to the other on the mere ground of priority of time, until it finds that there is no sufficient ground of preference between them."

What it means.

Illustrations.

(*a*) Between two mortgagees having only equitable estates, the first mortgage prevails over the second.

(*b*) A is a debtor to B. For valuable consideration A assigns the debt, first to C, and then to D, neither of whom gives notice to the debtor, or to the other assignee. C is entitled to priority over D.

Where the equities are not equal.

Exception 1.—But if the equities are not equal, the first in time would not prevail.

Illustration.

If the second mortgagee has been induced to advance money

through the fraud, misrepresentation or gross negligence of the first mortgagee, the latter is postponed to the former.*

Where one of the estates is also legal.

Exception 2.—Where either of the interests is not merely equitable, but legal as well, this maxim would not apply. [Such a case would be governed by the next maxim.]

Equal equities, law shall prevail.

IV. **Where there are equal equities, the law shall prevail.**—If two persons have equitable interests in the same subject-matter, *i. e.*, if each is equally entitled to the protection of a Court of equity, and one of them, in addition to his equity, also obtains the legal estate in the same subject-matter, then the latter will be preferred. In such a case, equity will refuse to interfere at all, and would thereby leave the parties to litigate in a Court of law, where, of course, the legal estate alone will be recognized. [The distinction between this maxim and the preceding one is this: in the latter, both the estates are purely equitable, while here, in addition, one of the estates is legal.]

Distinction between rules 3 and 4.

Illustration.

Tacking.

Tacking. Three different mortgages are executed in respect of the same property, to A, B and C respectively on different dates, neither of whom has notice of the prior mortgage or mortgages. The first mortgagee has the legal estate. By the former maxim, the mortgages rank in order of time; but if C, by paying off A's mortgage, obtains the legal estate, *i. e.*, obtains a conveyance of A's estate and an assignment of his securities, he is entitled to precedence over B even in respect of the third

* Cf. S. 76 of the Transfer of Property Act.

mortgage.* But if the first mortgagee has not the legal estate, the third mortgagee acquires no priority over the second by paying off the first mortgagee.

These two maxims have their best illustration in the case of a *bonâ fide* purchaser for value without notice. *Bonâ fide*, purchaser's defence :—

Bona fide Purchaser: His defence: —(*a*) *Where the plaintiff has the equitable estate merely, and the defendant*, who is a purchaser for value without notice has previously obtained the legal estate, *i. e.*, *has both legal and equitable estates*, equity would grant no relief as against him. (a) Plaintiff having equitable estate, defendant having legal estate as well, or the best right to call for the legal estate.

This principle also aplies, not only where the defendant has the legal estate, but also where, though not having the legal estate, he has *the best right to call for the legal estate*

Illustration.

A is the trustee, and B the *cestui que trust*. B alone mortgages his (equitable) interest to C. B then mortgages the same interest to D, who has no notice of the prior mortgage. D obtains from A, the trustee, a declaration that A will thenceforth be a trustee for D, and not for B. Here, as D has, by virtue of A's declaration, the best right to call upon A to convey the legal estate to D, D will have priority over B, who has a more equitable estate [*Wilmot* v. *Pike* 5 Hare 14].

(*b*) *Where the plaintiff has merely the legal estate and the defendant has merely the equitable estate*, and the plaintiff came to the auxiliary jurisdiction of (b) Plaintiff having legal estate, and defendant

* *Tacking* has, except in one solitary instance, been abolished in India. See S. 80 of the Transfer of Property Act.

having equitable estate, plaintiff could not obtain discovery or delivery.

equity either for discovery, or for delivery of the title-deeds, equity refused him aid, as against the *bonâ fide* purchaser.

Illustrations.

(a) Basset v. *Nosworthy* 2 Wh. & T. L. C. 150. A made a will by which he devised an estate to B. Afterwards A revoked the will and died, leaving C his heir-at-law. B obtained possession of both the wills, and sold the estate to D, concealing from him the fact that the will had been revoked. C applied to the auxiliary jurisdiction of equity, praying for *discovery* (*i. e.*, production) of the second will. His bill was dismissed.*

(b) Wallwyn v. *Lee* 9 Ves. 24. A, before his marriage with B, executed a marriage-settlement, by which he conveyed his estate to trustees, for himself and his wife jointly for their lives, and thereafter to the eldest son of the intended marriage in fee tail. Afterwards A and the trustees mortgaged the estate to C, and delivered over possession to him, together with the title deeds including the settlement. P was the eldest son of the marriage, and as such, became entitled in fee tail to the estate. P prayed for a delivery of the title-deeds, including the settlement, as against C. The bill was dismissed.*

Contra—Where the Court of equity exercised concurrent jurisdiction.

But where the Court of equity exercised concurrent jurisdiction with a Court of law, as in the case of dower, equity will help the legal estate as against the equitable estate.

Illustration.

Williams v. *Lamb* 3 Bro. Ch. 264. A person after his marriage sold certain lands to a *bonâ fide* purchaser, and then

* Now, the auxiliary jurisdiction being abolished, every Court may order discovery or delivery; and thus the plaintiff need not come to equity. These two cases have thus ceased to be of any importance.

died. A's widow brought a bill in Chancery for dower as against the property in the hands of the purchaser. The claim was allowed.

(*c*) *Where plaintiff has merely an equitable estate, and the defendant also has a mere equitable estate,* the first in time shall prevail, according to maxim III. Each party having mere equitable estate, first in time shall prevail.

(*d*) *Where the plaintiff has a mere "equity"* (*e. g.* an equity to set aside or rectify a deed on the ground of fraud or mistake), *and not an equitable estate, and the defendant has both the legal and equitable estates,* equity would not interfere. Plaintiff having a mere equity, defendant both legal and equitable estates.

Illustration.

A, acting under a mistake of fact, conveys his estate to B. B transfers the property to C, who has paid value, and was ignorant of A's mistake. A cannot set aside the transaction as against C, on the ground that the deed is void, being executed under a mistake of fact.*

V. He who seeks equity must do equity:—This maxim is a particular application of the paramount maxim of equity, that every action of the Court of equity must be governed by conscience and good faith. The meaning of this rule is, that a Court of equity will not grant relief to a person seeking its aid, unless he has admitted and conceded, or will admit and provide for, all the equitable (*i. e.*, not legal) rights of his adversary, which grow out of, or are inseparably connected with, the subject-matter of the controversy. A person seeking equity must do equity. The equities must arise out of the same subject matter.

Illustrations.

(*a*) *Wife's equity to a settlement.* Before the Married Equity to a settlement.

* Cf. S. 108 of the Indian Contract Act.

Women's Property Act, 1882, by the Common law, all the personal property of a married woman vested in the husband absolutely, without any interference from the wife, the wife's proprietary rights being confined to the properties comprised in the settlement. The result was, that a wife who had been ill-provided by the settlement, was often left destitute. Therefore, when a husband, being entitled to a wife's chose in action (*e. g.*, a debt) had to bring an action on it in equity (because the matter was one for which the Courts of law granted no relief), equity refused to grant any relief to the husband unless he agreed to secure an adequate portion of it to the wife by a settlement.*

Estoppel. — *(b) Equitable estoppel.* If the owner of a piece of land stands by, and knowingly suffers another, who supposes himself to be entitled to it, to build on the land, equity will compel the owner, when he comes to assert his title to the land, to indemnify the builder, or if he is a lessee under a defective lease, will confirm his leasehold interest.†

Usury laws (now repealed). *(c) Usury laws.* Under the usury laws, all usurious loans were utterly void. But if the debtor who had contracted a usurious loan came to equity for cancellation of the deed, equity required him to pay to the defendant the principal amount, with legal interest.‡

(d) Where there has been a misdescription of the property contracted to be sold on the part of the vendor, equity would not decree specific performance at his instance except upon condition that he would indemnify the defendant for his loss owing to the misdescription.

* The "wife's equity" has now become obsolete in most cases owing to the Married Women's Property Act, 1882.

† Cf. S. 52 of the Transfer of Property Act. For the limitations of this doctrine, see *Beni Ram* v. *Kundan Lal*, 21 All. 496.

‡ The usury laws have now been repealed, both in England and in India.

(*e*) In a suit by the vendor for specific performance of a contract of sale, equity will not direct specific performance unless he pays the balance of the consideration-money.

(*f*) A ward, on coming of age, sold all his properties to his guardian for an inadequate consideration, and released him from all liabilities due on the trust. In a suit by the ward to set aside the sale on the ground of constructive fraud, he was compelled to refund the purchase-money he had received.

(*g*) The doctrines of *Election*,' *Marshalling* and *Set-off* are based on this maxim.

Defendant resisting a suit in equity.

Exception 1.—This maxim does not apply unless a person *seeks* equity *i e*, brings a suit *as plaintiff* in equity for the protection of an *equitable* right, or for an *equitable* remedy Therefore it does not apply to a person defending a suit in equity.

Illustration.

An executor brought a suit in equity to recover a usurious loan due to the deceased. The defence was, that the loan was usurious, and as such, void. The defendant was entitled to judgment, without being ordered to pay the principal and lawful interest.

Exception 2.—This maxim has no application unless the defendant's equity arises out of the same transaction, or arises out of a matter so intimately connected with the subject-matter of the suit as to form practically the same transaction.

Must come to equity with clean hands.

VI. He who seeks equity must come with clean hands:—*He that hath committed iniquity shall not have equity.* When a plaintiff, who seeks the protection of equity, has violated conscience or good faith, equity will refuse to aid him, to acknowledge his

(equitable) right, or to award him any (equitable) remedy.

Rules 5 and 6 compared.

[*Comparison with the previous rule.* Both the rules resemble each other in this, that they are universal rules, regulating the action of equity Courts in their interposition on behalf of plaintiffs. But they differ as follows: rule 5 does not assume that the plaintiff has done anything unconscionable, much less does it refuse to grant him relief. It is prepared to grant relief, but on certain conditions only. Rule 6 is a penal rule; it assumes that the plaintiff has been guilty of inequitable conduct, and, as such, refuses him all aid]

Rule 6 is a penal rule.

Illustrations.

(*a*) *Specific Performance.* Equity will refuse specific performance of a contract, which may be perfectly valid in law, if the plaintiff has been guilty of undue advantage, circumvention, or sharp practices.*

(*b*) *Fraud.* A and B enter into an agreement to divide equally between themselves the property obtained by fraud. The fraud is accomplished, and the whole profit is in the hands of A. B sues A in equity for partition. The suit is liable to be dismissed.

(*c*) *Illegality.* Where the two parties to an illegal agreement are *in part delicto* (*i. e.*, in equal guilt), equity will not aid either of them, by enforcing the contract while it is executory, or relieving him against it while it is executed. Instances of this are to be found in agreements, the consideration of which is a violation of good morals, or of public policy, gambling, compounding of felony etc.†

* Cf. s. 28 of the Specific Relief Act.

† Cf. s. 25 of the Indian Contract Act.

VII. Delay defeats equities: Equity aids the vigilant, not the indolent:—This rule is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, when a party has slept over his rights and has acquiesced in the infringement thereof for a great length of time. Thus we have seen (*ante*, Page 12.) that in the exercise of its concurrent jurisdiction, equity strictly follows the law of limitations; but in the exercise of its exclusive jurisdiction, equity will refuse to interfere on the ground of delay, unless it is sufficiently accounted for, even where the statute of limitations would be no bar. The only exception equity makes is in favour of suits to enforce an express trust against the trustee.*

Delay defeats equities.

Calculated to excite diligence.

VIII. **Equality is Equity:** *Equity delighteth in equality*:—This maxim flows from the fundamental notion of equality or impartiality due to the conception of equity, and is the source of many equitable doctrines. Thus equity sometimes acts *directly* (*e. g.*, distribution) and sometimes *indirectly* (*e. g.* contribution).

Equality is equity e. g.

Illustrations.

(*a*) Pro rata *distribution.* By the Common law, a bond creditor (*i. e.*, when the debt was created by a sealed instrument) obtained precedence over simple contract creditors. But in equity, all the creditors are entitled to a rateable distribution.†

Distribution

* In India, such suits are unaffected by the statute of limitations. See S. 10 of the Limitation Act (IX of 1908).

† Cf. S. 73 of the Code of Civil Procedure (V of 1908).

and contribution.

(b) *Contribution.* When a creditor has a single claim against several persons, he has the option of realizing the debt from any one of them; and by the Common law, the debtor who had thus been compelled to pay the debt in full had no remedy against his co-debtors. But in equity he could claim contribution from the latter, so that the burden might press equally on all. Similar is the rule with respect to co-sureties and co-contractors.*

Joint-tenancy and survivorship.

(c) *Joint-tenancy.* Equity disfavours joint-tenancy, because of its one-sided incident of survivorship; and though not expressly abrogating the joint-tenancy, it lays hold of the slightest circumstance to treat a joint-tenancy as a tenancy-in-common. When two persons are joint-purchasers, they are, in the absence of anything to the contrary, joint-tenants in law; and this is not interfered with in equity. But when they have advanced the purchase-money in unequal shares, they are treated in equity as tenants-in-common. Similarly, when two persons have advanced money on a mortgage, whether in equal or in unequal shares, equity will treat them as tenants-in-common.†

Joint-liabilities.

(d) *Joint-liabilities.* Conversely, when there are two joint-debtors, on the death of one of them, in law the survivor alone is liable, while in equity the representatives of the deceased are liable as well as the survivor.‡

(e) *Abatement of legacies* pro rata. When the legacies are general legacies, they are liable to a proportionate reduction, in the event of the assets proving insufficient to pay the legacies in full.§

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* Cf. ss. 43 and 146 of the Indian Contract Act.

† Now in all cases, whether of mortgage or of purchase, the transferees are tenants-in-common—s. 45 of the Transfer of Property Act.

‡ Cf. s. 43 of the Indian Contract Act.

§ Cf. ss. 287, 290 of the Indian Succession Act.

(*f*) *Power of appointment.* A, the testator, grants a life-estate to B, and after B's death, to such of C's children as B shall name in his will. B dies intestate, without naming any. C's children are entitled equally. Failure to appoint.

IX **Equity looks to the intent rather than to the form**:—Equity always attempts to get at the substance of things, and to ascertain and enforce rights and duties arising from the true relations of the parties, without reference to their ostensible relation. A notable example of it is seen in the case of the seal—the absurd reverence paid to it by Common law, and the scant respect it received from equity [*Vide* the illustrations given Page 11, under Rule I]. Equity looks to the intent e. g. the seal.

Illustrations.

(*a*) The Common law theoretically observed the maxim that a contract without consideration was unenforceable, but if the contract was under seal, the Common law conclusively presumed the presence of consideration. Equity, however, always allowed a party to show that a contract is void for want of consideration, even though it was under seal.

(*b*) *Relief against penalties and forfeitures.* At Common law, if the contract was not wholly illegal, every stipulation was binding on the parties, whether it was in the nature of a penalty or otherwise. But when equity found that a particular stipulation was inserted merely to secure the enjoyment of a collateral object, it considered the enjoyment of that object as the primary object of the deed, and the penalty only as occasional. Therefore equity always relieves against penalties and forfeitures. Thus, A promises to pay Rs. 1000 to B within one year, on condition that if he pays Rs. 500 within six months, he shall be discharged from his liability. Here the payment of Rs. 500 is the original intention of the parties, and even after the expiry of six months, Equity would [illegible] Penalties and forfeitures.

discharge of the debt on payment of Rs. 500 with reasonable compensation for the delay. Similarly, equity relieves against forfeiture for non-payment of rent, because such a provision is intended merely as a security for the payment of rent.*

Mortgage.

(c) *Mortgages.* The equitable doctrine of mortgage has evolved out of this maxim. Common law looked upon the transaction as a complete transfer, subject to a condition of retransfer, on payment of the mortgage-money on a specified date. The mortgagee was thus the owner at law, and the mortgagor lost the right of redemption if he failed to pay on or before the due date. Equity, however, looked on the transaction as a mere security for the repayment of the loan, in accordance with the intention of the parties, and therefore treated the mortgagor as the equitable owner. Thus, even after the due date, equity allowed redemption at any time before the Court ordered foreclosure.

Regards that done what should have been done.

X. **Equity regards that as done which ought to have been done:**—Whenever between two parties an equity exists with respect to a subject-matter held by one of them in favour of the other, then as between these two, a Court of equity regards the subject-matter as though the equity has been worked out, and as impressed with the character and having the nature which it would in that case have borne. It must be noticed that this doctrine applies when one of the parties lie under an obligation to the other—something he *ought* to have done, and not what he *might* or *would* have done.

* *Per* Mookerjee J. in *Megh Lal* v. *Rajkumar* 5 C. L. J. 208, at p. 216-217; S. 114 of the Transfer of Property Act; *Sloman* v. *Walter* 2 Wh. & T. L. C. 257 at p. 262 As to what is a penalty and what is not, see the judgement of Mookerjee, J. in *Harak Sing* v. *Saheb Sing* 6 C. L. J. 176.

Illustrations.

(*a*) *Executory contracts.* A and B enter into a contract for the sale of A's land to B. Now, by the terms of the contract, the land ought to be transferred to B, and the purchase-money ought to be transferred to A. Equity regards these as done—B as having become the owner of the land,* with all the rights and obligations of ownership, and A as having become the owner of the purchase-money. Therefore, from the date of the contract, A can sell or give away the land, and is entitled to all accretions as well as bound to accept all losses taking place after the contract. On the other hand, A's interest is merely personal property, and would devolve as such, if he died in the meantime. Executory contract.

(*b*) *Doctrine of conversion.* Whenever a direction is given, whether by deed or will, to employ money in the purchase of land, or to sell land and turn it into money, from the day the deed or will takes effect, the land is considered as personal property, and the money as real property. Conversion.

XI. Equity imputes an intention to fulfil an obligation :—Whenever duty rests on a person, it shall be presumed that he intended to perform that duty, rather than to violate it; or, in other words, that he intended to do right, rather than wrong. Therefore, when a person covenants to do an act, and he afterwards does something which is capable of being considered either a total or a partial performance of that covenant, it shall be so considered, although no such intention was expressed. Imputes an intention to fulfil an obligation.

Illustration.

Doctrine of performance. A person covenanted by his marriage articles to purchase lands of the annual value of £200 in county A and to convey it to trustees for the benefit of himself

* In India, however, a contract of sale does not necessarily pass the ownership to the transferee. See Transfer of Property Act, S. 54.

Performance.

and his wife for their lives, and thereafter to his eldest son in tail. He purchased lands of greater value in county A but made no settlement of them, and then died. It was held, that the purchase was a satisfaction of the covenant, and would pass to the wife and then to the eldest son. [*Sowden* v. *Sowden* Bro. C. C 582]. If the lands purchased were of a less value, it would have been taken to be a part-performance.

Equity acts *in personam*, that is, by way of personal command on the defendant.

XII. **Equity acts in personam, not in rem**:—The early Chancellors, in order to avoid a direct collision with the Courts of law, adopted the principle, that their own judgments would operate *in personam* upon the defendants, and not *in rem*: that is to say, the decree of a Court of equity did not directly operate to transfer a legal right from the defendant to the plaintiff, but was in the nature of a personal command on the defendant, and the decree was carried into effect through his personal obedience. Thus,

Specific performance and injunction.

when a suit for specific performance was brought in equity, the decree directed the defendant to execute a conveyance within a certain time, on failure of which, he was liable to fine and imprisonment. Therefore, it is evident that equity also granted reliefs *in rem*, though indirectly. An injunction is an obvious instance of this; and by its free application, the Chancellors in a large measure restrained judicial proceedings in Courts of law. By the application of this doctrine, the Court even assumed jurisdiction over

Jurisdiction over lands [illegible]

lands situate outside England, provided the defendant was in England, and the remedy could be obtained through his personal obedience. But if the [illegible] lands situate abroad is in question, equity does not interfere, leaving it to be determined by the local forum,

THE ORIGINALLY CONCURRENT JURISDICTION.

CHAPTER III.

ACCIDENT.

Definition. "Accident" in equity means any unforeseen event, misfortune, loss, act or omission such as is not the result of any negligence or misconduct in the party. Formerly, the Courts of law granted relief in some cases of accident, and later on their power to interpose in such cases was largely extended by the legislature. But Courts of equity did not thereby lose their previous jurisdiction in cases of accident, because the statutes have been held to have conferred not exclusive, but concurrent, jurisdiction on the law courts in such cases.

'Accident' defined.

How equity exercises concurrent jurisdiction.

WHERE EQUITY WOULD GRANT RELIEF.

There are three principal groups of accident in which equity exercises jurisdiction :—

Three principal heads of relievable accident.

I.—Lost and destroyed documents.

II.—Imperfect execution of powers.

III.—Erroneous payments.

I.—LOST AND DESTROYED DOCUMENTS.

Lost and destroyed documents.

(1) **Lost bonds or other instruments under seal.**— A Court of law could not grant any relief, until recently, and therefore equity granted relief, that is to say, allowed the plaintiff to maintain such an action, upon giving proper indemnity in favour of third persons

who might be found to have acquired an interest in such a bond.

Lost title-deeds.

(2) **Lost title-deeds.**—In such a case, Courts of law could grant relief, upon taking secondary evidence of the loss; and therefore in order to enable a party to come to equity, it was necessary to allege some special inconvenience arising from the loss. Thus he might come to equity where a title-deed had been destroyed, or was concealed by the defendant; for, then as the party could not know which alternative was correct, a Court of equity would make a decree (which a Court of law could not) that the plaintiff should hold and enjoy the land until the defendant should have produced the deed, or admitted its destruction. Similarly if the title-deeds were lost, and the party in possession prayed discovery, or to be established in his possession under it, equity would relieve; for no remedy lay at law in such a case. And even if the plaintiff was out of possession, if he could prove some other grievance besides the mere loss, *e. g.*, that he would be unduly hampered in future in asserting his title, equity granted relief.

Some special circumstances must be alleged.

Lost negotiable documents.

(3) **Lost negotiable instruments.**—In such cases, no action could lie at law; but equity granted relief, by allowing the party to sue on giving sufficient indemnity against the claim of any person who might afterwards be found to have acquired an interest in the lost instrument.*

* O. 7 R. 16 of the Civil Procedure Code (V of 1908).

II.—Defective Execution of Powers.

Powers.

Mere power —defective execution relieved, in favour of certain persons only, but non-execution or material irregularities not relieved.

(1) **Mere power.**—In the case of a mere power of appointment (as opposed to a power in the nature of a trust), a Court of equity will interpose and grant relief, when by accident or mistake, there is a *defective* execution of a power, but not in the case of *non-execution* of a power.

Illustrations.

(*a*) The want of a seal, or of witnesses, or of a signature, and defects in the limitations (*i.e.*, description) of the property, estate or interest, and any other irregularity of a like nature, will be aided.

(*b*) Equity will aid, when a power required to be by a deed *inter vivos*, is made by will ; but not when the power is required to be executed by a will, and it is made by a deed—being apparently contrary to the settlor's intention ; for a will is revocable, whereas a deed is not.

But equity will not aid defects which are of the very essence or substance of the power—*e. g.*, when it is executed without the consent of the parties whose consent is necessary.

Moreover, this relief in mere irregularity in execution will be granted only in favour of persons who are morally entitled to the same and are viewed with peculiar favour in equity—*viz.*, (*a*) transferee for value (*b*) creditor (*c*) wife (but not husband) (*d*) legitimate child (but not natural child, or grandchild, or remote relations), and (*e*) charity.

Powers in the nature of trusts—even

(2) Powers in the nature of trusts.—In such cases even if the power is not executed at all owing to some

non-execution will be relieved.

accident, equity will grant relief, because trusts or powers in the nature of trusts, are always obligatory upon the conscience of the person entitled.

Illustration.

A testator devises certain lands to A, with a direction that A should, at his death, distribute the same among his children and relations as he would choose. A has a power in the nature of a trust, and if he dies without making any distribution, a Court of equity will interfere and make a suitable distribution.

III.—Erroneous Payments.

Erroneous payment, without negligence.

Executors and administrators are often relieved from the consequence of an erroneous payment, made in good faith and without negligence.

Illustrations.

(*a*) *Edwards* v. *Freeman*, 2 P. Will. 447. The executor pays off a legacy, beheving in good faith that the assests are sufficient for all purposes. It subsequently turns out, that a large portion of the assets have been stolen, or could not be recovered, owing to the insolvency of a debtor to the estate, or that there are more debts.* The executor is entitled to claim a refund from the legatee.

(*b*) But if the executor could, with reasonable diligence, have known of the insolvency, or of the debts, or could have prevented the theft, he cannot claim a refund.

(*c*) *Pooley* v. *Ray* 1 P. Will. 355. If an executor receives money upon a judgment and pays it to creditors, but the judgment is afterwards reversed in appeal, and the executor is compelled to refund, he may recover it back from the creditors.

* Cl. 3, 319 of the Indian Succession Act.

WHERE EQUITY WOULD NOT GRANT RELIEF.

Equity will not grant relief.

(1) **In matters of positive contract,** equity will not interfere, when a party has been prevented from fulfilling the contract by accident. (a) In matters of contract.

Illustrations.

(a) Beresford v. *Done* 1 Vern. 98. A lessee covenants to pay rent, and keep the demised premises in repair. The estate is afterwards destroyed by an inevitable accident *e. g.* by lightning or earthquake, or by a mob or other irresistible force. The lessee is bound, both in law and in equity, to pay rent and to repair the estate, because he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume an intentional general liability, when he has made no exception.*

(b) White v. *Nutt* 1 P. Will. 61. There is a contract for a sale at a price to be fixed by an award during the life of the parties. One of the parties dies before the award is made. The contract fails, because the time of making the award is expressly fixed by the parties in the contract, and there is no equity to substitute a different period.

(2) Where the accident has arisen from the *fault* or *gross negligence* of a party, he cannot ask a Court of equity to save him from the results of his misconduct or negligence. (2) Where the accident is due to the fault or gross negligence of the party.

(3) Where the party claiming relief *has not a clear vested right,* but has a mere expectancy, which is a matter, not of trust, but of volition, equity will not interfere. (3) Where the plaintiff has a mere expectancy.

* But Cf. S. 108 (a) of the Transfer of Property Act.

Illustration.

A testator intends to make a will in favour of a particular person, but is prevented from doing so by accident. Equity will not grant relief, because a legatee can take only by the bounty of the testator, and has no independent right.

(4) Where the other is a *bonâ fide* purchaser.

(4) Where the other party stands upon an equal equity, and is entitled to equal protection, equity will not interfere—*e.g.*, as against a *bonâ fide* purchaser for value without notice.

CHAPTER IV.

MISTAKE.

'Mistake' defined.

Definition. Mistake is a mental condition, a conception, a conviction of the understanding—erroneous indeed, but none the less a conviction—which influences the will and leads to some outward physical manifestation. It is distinguished from *accident*, which is some unexpected occurrence *external* to the party affected by it; and from *fraud*, by the absence of knowledge or intention.

Mistake may be one (1) of law, or (2) of fact.

I. MISTAKE OF LAW.

Mistake of law is no excuse.

With respect to mistakes of law, the general rule is *Ignoratia legis neminem excusat* (ignorance of law is no excuse).* This is founded on the best of reasons, for, if ignorance of law were allowed to be pleaded, there is no knowing to what extent this excuse of ignorance may not be carried.

* Cf. S. 21 of the Indian Contract Act.

What is meant by a mistake of law :—

But equity relieves in certain cases of ignorance of law, which may properly be regarded as so many exceptions to the above rule. To consider what are those cases, it is necessary to understand what is precisely meant by the phrase 'mistake of law'.

(1) ignorance of some general law.

Mistake of law: what is means:—(1) An ignorance with respect to some general rule of municipal law applicable to all persons, which regulate human conduct, determine rights of property, or of contract etc.

Illustration.

A does not know that speaking falsely of another (defamation) is an offence, or that when a man dies intestate his property passes to his son, or that an estate in fee simple is transferable.

(2a) ignorance of the legal effect of a transaction.

(2) An ignorance of a particular person with respect to his own legal rights—

(*a*) He may be correctly informed of his antecedent legal rights, but may incorrectly apprehend the nature and effect of a transaction into which he is about to enter.

Illustration.

A advances money on a mortgage to B, on the mistaken supposition that after the specified date of payment he will be the owner of the property without the intervention of the Court.

(2b) ignorance of one's existing legal rights.

(*b*) He may be ignorant of his own antecedent legal rights, which are to be affected by a transaction into which he is about to enter, although he correctly apprehends the nature of the transaction.

Illustration.

A, who is the legal owner of an estate, in ignorance of this fact, and supposing it to belong to B, enters into a contract with B for the purchase of the estate.

[Of these three heads, the last one, as we shall see, would be relieved in equity; the other two would not.]

Exceptions to the rule :—

Exceptions to the rule that ignorance of law is no excuse:—(1) Where a person is mistaken as to his existing legal rights, and under such a mistake, enters into a transaction which affects him injuriously, equity will interfere [Case 2 (b) above]. The reason is, that a private legal right is a very complex conception, and depends so much on conditions of fact that it is difficult, if not impossible, to form a distinct notion thereof apart from the facts on which it depends. Mistakes therefore, of a person's private legal rights have in equity been regarded as mistakes of fact.

(1) ignorance of one's private legal rights.

Illustrations.

(a) Cooper v. *Phibbs* 2 H. L. 149. A, being ignorant that certain property belonged to himself, and supposing that it belonged to B, agreed to take a lease of it from B at a certain rent. There was no fraud, no unfair conduct on the part of B. The House of Lords set aside the contract.

(b) Lansdowne v. *Lansdowne* 2 P. Will. 205. The plaintiff was the only son of the elder brother of a deceased intestate. He had a dispute with his uncle, a younger brother of the deceased, concerning their respective rights to inherit the lands of the deceased. They agreed to consult a schoolmaster, one Hughes. Hughes went for instruction to a book called "The Clerk's Remembrancer," and there found the law laid down that "land could not ascend, but always descended", and he there-

upon informed the parties that the lands went to the younger brother, the plaintiff's uncle. Upon this decision, the plaintiff and his uncle agreed to share the lands between them, and conveyances were executed carrying out this arrangement. The result was that the plaintiff, through a mistake of law, conveyed away lands which clearly belonged to himself. He asked for and obtained relief.

(*c*) A and B are both jointly bound as sureties to C. C releases A under the mistake of law that B would thereafter remain bound. B is discharged. [Case 2 (a) above].

(*d*) A, having a power of appointment, executed it absolutely, without reserving a power of revocation. He acted under the mistake of law that being a voluntary deed, it was revocable. A has no remedy. [Case 2 (a) above].

(*e*) A legacy was given to a woman on condition she married with the consent of her parents, and in default, to A and B. She married without the consent of her parents, and thus incurred the forfeiture. A and B executed a deed, by which they waived the forfeiture incurred by her, A and B shall not be relieved on any ground of mistake of law or surprise, because they deliberately entered into the transaction, and had before them the very will out of which the forfeiture arose [*Pullen* v. *Ready* 2 At. 591].

Where the document does not express the real intention of the parties.

(2) Where, through a mistake of law, the document which a person executes does not carry out the real intention of the parties, equity will interfere—*e. g.*, error as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases.

Where the mistake is induced by fraud.

(3) Where there is a mistake of law of one party, and such mistake is induced, aided or accompained by conduct of the other party positively inequitable, and containing elements of wrongful intent—*e. g.*, misrepresentation, imposition, concealment, undue

influence, breach of confidence reposed, mental distress or surprise, equity will interfere.

Mistake of foreign law.

(4) Where the mistake is one of foreign law, it shall be deemed a mistake of fact.*

Compromises e. g. settlements, will not be lightly interfered with.

Compromises. Where doubts with respect to individual rights, especially among the members of a family, have arisen, and where the parties, instead of ascertaining and enforcing their mutual rights and obligations which are yet undefined and uncertain, intentionally put an end to all controversy, by a voluntary transaction by way of a compromise, such compromises are highly favoured in equity. They will not be disturbed for any ordinary mistake, either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such disputes without a judicial controversy. Equity would be all the more reluctant to reopen a compromise, if the position of the parties have been altered, and thereby it is impossible to restore the *status quo*. But in every compromise there must not only be good faith and honest intention, but full disclosure as well.

Money paid under mistake of law cannot be recovered,

Money paid under a mistake of law. If a man make a payment under a misconception as to his liability to make the payment, but with full knowledge, or with the means of obtaining knowledge, of all the circumstances, he cannot recover back such money.

unless there is a violation of confidence.

Exception But where the erroneous payment is induced or is accompained by a violation of confidence

* Cf. S. 21 of the Indian Contract Act.

reposed, lack of full disclosure, misrepresentation as to liability, or such other inequitable conduct, or under legal compulsion, it may be recovered back.

II. MISTAKE OF FACT.

Mistake of fact is, general, remediable in equity, but subject to the following conditions :— Mistake of material fact,

(1) *The fact must be material*; otherwise equity would not interfere.

Illustrations.

(*a*) A sells an estate to B, both parties supposing that A has an absolute title to it. It turns out that A has no title at all. Equity will relieve.

(*b*) A sells the estate as 20 bighas. It turns out to be 19¾ bighas. Equity would not interfere, because the difference would not have varied the transaction in the view of either party.

Especially if both the parties labour under a common mistake as to the existence or essential condition of the subject-matter of a contract, equity will relieve*. e. g. the existence or essential condition of the subject-matter.

Illustrations.

(*a*) A and B contract for the sale of a house. The house was, at the date of the contract, destroyed by earthquake or cyclone. Both the parties were ignorant of it. The contract is void.

(*b*) A and B contract for the sale of an annuity during the life of C. C was already dead, but neither A nor B knew of it The contract is void, because both the parties intended the sale and purchase of a subsisting thing.

(*c*) C is the life-tenant, and A the reversioner. A contracts to sell the reversion to B. C was dead at the time of the contract, but none of the parties knew it. The contract is void.

* Cf. S. 20 of the Indian Contract Act.

The fact must be incapable of being known with ordinary diligence.

(2) *The fact must be one that could not have been known with ordinary diligence—i. e.*, the other side must have been under an obligation to disclose it.

But where the fact was unknown to both, and each had equal means of knowledge, or where each relied on his own judgment, equity will not relieve.

Illustration.

A has knowledge of a declaration of war, or of a treaty of peace, or of the state of a foreign market, which would materially enhance the value of a commodity belonging to B. A is not bound to disclose, and the sale is good.

Thus, where a mutual mistake as to a fact is a material ingredient in the contract, and disappoints their intention by a mutual error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are reposed by law upon the conscience of either party, or where an unconscientious advantage is taken by a party of the other's mistake, equity will interfere.

Remedies :— (1) If the mistake is one-sided.

Remedies for mistake :—(*1*) *Where the mistake is unilateral, i. e.*, of one side only, and the contract has been completed by the due conveyance, the plaintiff cannot have rectification of the instrument, still less can he have rescission, unless it would be a fraud in the defendant to retain the advantage of the mistake, or unless where the plaintiff's mistake has been induced by the defendant.

(2) If it is mutual.

(*2*) *Where it is bilateral i. e.*, of both the parties, the plaintiff can have rectification as a matter of right, unless where the plaintiff has, by his own laches,

precluded himself from relief. And the Court will, in such a case of rectification, often give the defendant the option of rescission.

Rectification. Where, by accident, mistake or fraud, the document does not express the true intention of the parties, even oral evidence may be admitted to vary the terms of the written statement. But the rectification is easier when the mistake is made out by some other preliminary document. Rectification. by parol evidence, or by a preliminary document.

(*a*) *Mistake in marriage-settlements.* On a marriage, the parties usually convey to trustees certain properties to the use of the husband and the wife, and the eldest son of the intended marriage. Usually before marriage, marriage-articles are executed, which are a memorandum or sketch of the marriage-settlement to be executed afterwards. A settlement which is executed before marriage or is executed after marriage in pursuance of ante-nuptial marriage-articles, is not a voluntary conveyance, but a conveyance for value, because marriage is a valuable consideration; but a post-nuptial settlement which is not made in pursuance of ante-nuptial articles is a conveyance without consideration (because the marriage, being a past consideration, is no consideration), and would thus be void as against purchasers or creditors (13 Eliz. and 27 Eliz). Now equity, which favours marriage-settlements, leans towards the construction of the settlement as a conveyance for value, and will keep this in view while correcting the mistakes of a settlement by a reference to the marriage-articles. Mistakes in marriage settlements, corrected by the articles.

Thus,

(1) If both the articles and the settlement are prepared before marriage, the settlement will be considered the binding instrument, because all the parties are, before marriage, at liberty to alter the transaction and the settlement will not, on that account, be a voluntary conveyance. But even in such a case, if the settlement purports to be, or was intended to be made in pursuance of the articles, the settlement will be brought in conformity with the articles.

(2) If the settlement is after marriage, it is liable to be altered and brought into conformity with the articles, in accordance with the presumed intention of the parties that it is to be in pursuance of the articles, because, otherwise, the settlement will be a voluntary conveyance.

Deed cancelled under mistake may be set up.

(*b*) *Instrument cancelled under a mistake.* In such a case, equity will grant relief, by setting up the cancelled deed.

Mistakes in wills, if patent on the face of the will, may be corrected in equity.

(*c*) *Mistakes in wills.* When the mistake is purely a matter of the true interpretation of a will, *e. g.*, if it is a manifest omission, or is plain on the face of the will, equity will grant relief.

So also, a mere misdescription of the legatee in the will, will not affect the legacy. But where a false character is given to a person, and it appears to have been the only motive for the gift (*e. g.*, when a testator grants a legacy to a person, the sole motive for the gift being that he is the adopted son of the

testator, which in fact he is not,* the legacy will be set aside. But all such objections to a will must now be made in the Probate Division.

Similarly, where a testator revokes a legacy under a mistake of fact, *e. g.*, that the legatee is dead, while, as a matter of fact, he is living, equity will decree the legacy.

Where equity will not relieve in cases of mistake of fact :— Equity will not relieve—

(1) If the defendant stands upon an equal or superior equity. (1) against *bonâ fide* purchaser.

Illustration.

Equity will not correct a mistake as against a *bonâ fide* purchaser for value.

(2) If the document which is wanted to be rectified is void by statute (because equity followed the law). (2) If the deed is void by statute.

(3) When a statute provides an adequate relief for the mistake, equity will not interfere. (2) Where a statute provides relief.

CHAPTER V.

ACTUAL FRAUD.

Definition.—As fraud is infinite, equity is reluctant to define "fraud." It may, however, be defined as any act, omission or concealment, which involves the breach of a duty, legal or equitable, or by which an undue or unconscientious advantage is taken of another. 'Fraud' defined.

* See Mayne's Hindu Law and Usage, Page 229 (6th Edition.)

Actual fraud.

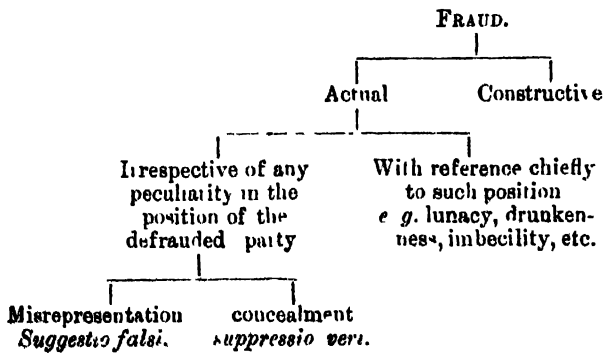
"*Actual fraud*" or positive fraud is any cunning deception or artifice used to circumvent, cheat or deceive another.

Fraud was sometimes cognizable at law—*e. g.*, reading a deed falsely to an illiterate person was a ground for avoiding it, or fraud in obtaining a will was remediable at law.

On the other hand, fraud is sometimes irremediable, even in equity—*e. g*, if A induces B to enter into a smuggling business on a fraudulent representation of large profits, and thereby receives money from B, B has no remedy—on the principle that they are *in pari delicto* (in equal guilt).

Fraud classified.

CLASSIFICATION OF FRAUD.



Misrepresentation.

Misrepresentation (*suggestio falsi*). Misrepresentation is where a party intentionally misrepresents a material fact, and so produces a false impression on the mind of another, who is thereby led to act on it to his prejudice.

(1) *Misrepresentation must be of a material fact* which would be likely to affect the consent of the other party. Must be of a material fact,

It must not be a matter of mere opinion, or of puffing, such as is often done by vendors—*e. g*, if a seller says, that the picture which he is about to sell is a "really good thing," or "absolutely the best in the market," or "remarkable for excellence in landscape painting," etc. and not a matter of mere opinion or puffing.

But the matter would be otherwise, if a person of known skill and judgment were to describe a picture in these terms. The reason is, that such expressions of opinion, as coming from a person competent to pronounce an opinion, are frequently acted upon, whereas mere puffing is taken for what it is worth.

(2) *Misrepresentation must be something with regard to which one party places confidence in the other.* Thus, where a purchaser is in a position to judge for himself, he will not in ordinary cases, be heard to say, that he has acted upon a representation of the vendor. One party must have relied on the other. *Contra*—where a person judges for himself.

But there are exceptions to the generality of this proposition. For example, if the sale is by order of the Court, the purchaser is entitled to be accurately informed of every material fact, even though he might, with ordinary diligence, come to know of such facts. Similarly in a sale of a leasehold estate, a misrepresentation with respect to the contents of the lease will avoid the sale, even though the lease itself is produced for inspection at the sale. So also, when there is a Examples.

misrepresentation in the prospectus of a company, as regards the contracts by the promoters, it will not be excused, even if it says that the contracts are open to inspection.

The misrepresentation must have misled.

(3) *Must have misled.* If the misrepresentation has not been acted upon, the defrauded person has no remedy.

Illustration.

A, the seller of an oil-mill, represents to B that the mill produces daily 100 maunds of oil. B inspects the account-books and finds it produces 80 maunds only. B then purchases the mill. He is not misled by A's representation.

Ambiguous statements.

Where the statement is ambiguous, plaintiff must show that he relied on and acted on the incorrect

Illustration.

Smith v. *Chadwick* 20 Ch. D. 27. The seller of a mill said "The present annual value is £100,000." It may mean, that the mill actually yields so much profit, or that it is capable, under good management, of yielding so much profit. The purchaser, in order to avoid the contract, must show that he understood it in the former sence.

Must have been prejudiced.

(4) *To his prejudice.* The plaintiff shall not have his action unless he has been substantially prejudiced.

Must not have ratified.

(5) *Must not have ratified it.* If a person, who is prejudiced by a fraud, ratifies it, he loses his action. Ratification may be by express words, or by conduct.

Illustrations.

(*a*) A person, after having discovered the fraud, continues to deal with the person who has defrauded him. This is ratification.

(*b*) A person, after having discovered the fraud, for a long time continues to enjoy the benefits of the transaction in which he has been defrauded. This is ratification.

Fraud of directors. If the directors have made a fraudulent statement in the prospectus of a company, the company will be liable therefor—only to the extent of the profits it has made thereby. But the directors are personally liable for the fraud.

Director's fraud—liability of the company, of the directors personally, and of the estate of a deceased director.

If a director is dead, his estate is liable only to the extent of the profits accruing to the estate, just as in the case of any other tort.

But when the proceedings have been taken under the Directors' liability Act, 1890, the liability is as for *compensation*, and the estate of the deceased director is liable to contribute *pro rata*, whether it has been profited or not.

Directors' Liability Act.

Remedies for fraud. If the fraud can be made good, the transaction will stand, and the fraudulent party will be compelled to make it good.

Remedies for fraud:—

(1) The representation if possible, will be made good.

Illustration.

A representing to B that an estate is free from incumbrances, induces B to purchase it. B afterwards finds out that the property is subject to a mortgage. A shall be compelled to redeem the mortgage.

But if the fraud cannot be made good, the defrauded party will be entitled to avoid the contract and to claim damages.

Otherwise, (2) rescission and damages.

Even an innocent person cannot keep the benefit of a fraud, unless he is a *bonâ fide* purchaser for value.

Illustration.

If A induces X to make a deed of gift in favour of A, B and C, the whole deed is liable to be set aside.

Concealment of a material fact, which a person is bound to disclose.

Concealment *(Suppressio Veri).* It is the suppression of a material fact, which one party is under a legal obligation to disclose to the other *. If there is no duty to disclose, there is no fraud from concealment. But the case is otherwise, if the fraud is an *aggressive* or *industrious* one.

Concealment of an extrinsic circumstance, and of an intrinsic circumstance.

There is in equity some difference between concealment of an *intrinsic* circumstance, and that of an *extrinsic* one. A circumstance is called *intrinsic* when it relates to the nature, character, condition, existence, title, safety, use or enjoyment—*e. g.*, natural or artificial defects in the subject matter. *Extrinsic* are accidental circumstances—*e. g.*, peace or war, character of the neighbourhood, etc. Now in the concealment of an extrinsic circumstance, as well as of an intrinsic circumstance, the general rule is, *caveat emptor* (beware, purchaser !).

But the maxim of *caveat emptor* has been somewhat relaxed in the case of intrinsic circumstances, so that in some cases of concealment of such a circumstance, equity will grant relief. For instance, silence will in some cases be treated as tantamount to representation.

* As under S. 55, (1) (*a*), and (5) (*a*) of the Transfer of Property Act.

Illustrations.

(*a*) When a person sells to another an estate, knowing that he has no title to it, he is bound to disclose his want of title, because the very sale implies that he has title. Concealment of want of title.

(*b*) When a person sells to another a house which he knows has been burnt down, he is bound to disclose that fact, because the sale is ostensibly of a subsisting thing. Concealment of the non-existence of the subject matter.

(*c*) In cases of insurance, the insured is bound to disclose every material fact to the Insurance Company. Thus, where in answer to a question put by the Company "what proposals have been made of any other insurance, and with what result?", the insured stated, "insured at the X and Y Companies for— sums". It appeared, that he was insured at X and Y Companies, *but his proposals have been rejected by others. Held*, this concealment amounted to a fraud. Insurance.

(*d*) In family-agreements, there must be the fullest disclosure by every party; otherwise, the concealment of a material fact would amount to fraud. Family agreements.

But a concealment of an *extrinsic* circumstance will never be treated as a fraud.

Inadequacy of Consideration. Mere inadequacy of consideration is not, in itself, a ground of relief in equity. The value of a thing is what it will produce; and it admits of no precise standard. It must be, in its nature, fluctuating, and would depend on innumerable different circumstances. One man, in the disposal of his property, may sell it for less than what another would. He may sell it under pressure of circumstances, which may induce him to part with it at a particular time. If Courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind. Inadequacy of consideration in itself is no ground of relief.

But it is a matter of evidence.

But inadequacy of consideration may, together with ther suspicious circumstances, be a ground of relief, as raising a presumption of fraud.

Gross inadequacy.

Very gross inadequacy of consideration, however, which shocks the moral nature of a person, may, in itself, demonstrate fraud or surprise in the transaction, and may thus be a ground for relief.

Rescission would not be allowed,

Rescission of fradulent contracts. A fraudulent contract is not *ab initio* void, but voidable, that is to say, is valid until rescinded. Therefore, by the change of circumstances, this rescission may become impossible, as for instance, where the parties cannot be restored to the *status quo*, or where the right of innocent third persons have intervened.

where parties cannot be restored to *status quo* or against innocent third parties.

Illustrations.

(*a*) A is induced by the fraud of the directors to take shares in a company. After the commencement of the winding up, A prays to be relieved from the transaction. Equity would not grant relief because the interest of innocent third persons *viz*, the creditors of the company, have come into operation.

(*b*) A, a broker or director, by fraudulent representation induces B to take shares in a company. The company is not at all implicated in A's fraud. A cannot rescind the transaction as against the (innocent) company.

Statutory frauds in relation to companies.

Statutory Frauds of Companies. The following matter in relation to companies have been declared to be fraudulent by statute, whether in themselves they are frauds or not.

(1) Fraudulent preference.

(1) *Fraudulent preference.* Any conveyance which would be a fraudulent preference in the case of an

individual, would also be a fraudulent preference in the case of a company on the verge of its winding up, and the transaction would be set aside for the benefit of the general body of creditors.

Illustration.

A company, knowing itself to be unable to pay off all the creditors in full. pays off a particular creditor in full. This is fraudulent preference, and as such, voidable for the benefit of the general body of creditors.

(2) Non-disclosure of contracts made by the promoters.

(2) *Non-disclosure of contracts.* All contracts entered into by the promoters of a proposed company, and the names of persons with whom such contracts are made, must be disclosed in the prospectus, if they are of a kind to influence the prospective shareholders. An omission to disclose such contracts in the prospectus would be fraudulent.

(3) Waiver-clause as regards non-disclosure or other matters.

(3) *Waiver-clause.* A waiver-clause in a prospectus, whereby the applicant for shares purports to waive his right, if any, in respect of the non-disclosure of contracts or of other matters, is void.

(4) Payment of interest out of capital.

(4) *Misappropriation of capital.* Making payments out of capital, when such payments should be made out of the profits, if any, is a fraud on the shareholders, but payment of interest on *prepaid shares* out of a portion of the capital is not so.

(5) One-man company fraud.

(5) *One-man Company fraud.* A one-man Company is where one man purchases all the shares of the company. Such a company, if duly incorporated, will not be set aside, because it is a one-man company. But an assignment to such a company will be set aside

when it is a fraud on the creditors of the man who is the proprietor of the company. For instance, he might purchase properties in the name of the company of which he is the sole owner, and thus deprive his own creditors of the benefit of such property. This would be a fraud on the creditors.

(6) Minority suppressed by majority.

Minority overborne by majority. Generally the rule is, that all the internal affairs of the company shall be governed by the will of the majority. But where the majority of the shareholders, in league with the directors, are unfairly overruling the minority, and are depriving the minority of the exercise of their just rights, the Court will interfere, as a fraud on the minority.

Peculiarity in the defrauded party.

Frauds on lunatics, infants, etc. Minors, idiots, lunatics, etc. are persons who have not the capacity to enter into contracts, and every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud on them and their rights.

(1) Lunacy.

(1) *Lunacy.* The contract of a lunatic will be set aside in equity; but where the contract is entered into, in good faith, and for the benefit of the lunatic, it will be upheld.*

Thus, where the purchaser did not know of the lunacy of the vendor, and did not take any unfair advantage, and the parties cannot be restored to the *status quo*, equity will not relieve.

It is now well-settled that a lunatic is liable on a reasonable contract entered into by him, if the other

* See s. 68 of the Indian Contract Act.

side did not know that he was insane—*Molton* v. *Camroux* 2 *Ex.* 487.

(2) *Drunkenness.* Drunkenness, in order to be a ground for relief, must be such as to temporarily deprive the understanding. But drunkenness, even of a lesser degree, will be relieved, if they are procured by the fraud or imposition of the other party. (2) Drunkenness.

(3) *General imbecility.* If a person is of so weak an understanding as to be unable to guard himself against imposition or importunity, he will be relieved in equity against his own transaction. (3) Imbecility.

(4) *Undue influence* (on testators). If by undue influence, a man is made to make a will which is contrary to his own inclination, the will is liable to be set aside. But in order to establish this undue influence, it must be shown that the real intention of the testator was repressed. The mere fact that the testator was influenced by immoral or irreligious considerations, will not amount to undue influence. (4) Undue influence on testators.

(5) *Duress and extreme necessity.* Similar would be the result of a contract made under duress or in extreme necessity or terror. (5) Duress and extreme necessity.

(6) *Infancy.* Formerly, the contract of an infant was merely *voidable* (and not void), so that the infant was at liberty, on attaining majority, either to ratify the transaction or to avoid it. But he could bind himself for necessaries, or by a contract of apprenticeship. (6) Infancy.

But now, by the Infants' Relief Act, all the personal contracts of the infant are utterly *void* (and not merely *voidable* as before), so as to be incapable of Infants' Relief Act.

Exceptions.

ratification on the infant's attaining majority, subject to the following exceptions :—

(*a*) The *marriage-articles* of an infant are binding on him as a contract for necessaries, or at all events are not void *ab initio*, but voidable—that is to say, would be either affirmed or repudiated by the infant, within a reasonable time, on his attaining 21 years of age.

(*b*) *Money actually paid* by an infant under a void contract, when there has been part-enjoyment by him, cannot be recovered back.

(*c*) *Conditions attached to a gift.* When a gift or devise is made to an infant, on condition of his doing something (*e. g.* when the gift is of shares, and the condition is payment of unpaid calls), if the infant accepts the gift, he must observe the condition, and infancy would allow no immunity to his non-performance of that covenant or condition

(7) Married woman.

(7) *Coverture.* A woman under coverture (*i.e.* a married woman) had formerly no capacity of binding herself by contracts ; and as regards her contracts for necessaries, she bound, not herself, but her husband.

Married Women's Property Act.

But now, by the Married Women's Property Act, 1882, a married woman is a *feme sole* (*i. e.*, like an unmarried woman) with respect to her separate property, so that she can bind her separate estate by her personal contract.

CHAPTER VI.

CONSTRUCTIVE FRAUD.

'Constructive fraud' defined.

Definition. Constructive fraud, or fraud in law, is fraud that arises by construction of equity, although there be no fraud in fact. It means such acts or contracts as although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by reason of their effect on the public interests, equally reprehensible with positive fraud.

Heads of constructive fraud.

Constructive fraud is either (1) contrary to the policy of the law, or (2) an abuse of some fiduciary relation, or (3) a fraud upon the private rights and interests of third persons.

I. CONTRARY TO THE POLICY OF THE LAW.

Contrary to public policy.

Marriage brocage contracts.

(1) **Marriage brocage contracts.** Contracts and agreements respecting marriage, by which a party engages to give another a reward if he will negotiate an advantageous marriage for him, are void, because they interfere with the freedom of choice. Marriages of a suitable nature being of the utmost importance to the well-being of society, every temptation to the exercise of an undue influence, or improper eagerness on the part of a stranger should be suppressed, and they are void, being opposed to public policy. Such contracts have been well described as a sort of "kidnapping into a state of marital servitude."

They are so much disfavoured that they are incapable of being confirmed even after marriage, and money paid under such a contract may be recovered back.*

Parents or guardians receiving secret reward.

(2) **Secret agreements for reward to parents** or other guardians for promoting or consenting to the marriage of their children or wards are void. They are in effect equivalent to contracts for the sale of children, and are as much opposed to public policy as the above. †

Secret agreements in fraud of marriage.

(3) Similar is the principle where persons, upon a treaty of marriage, mislead other parties by acts which by secret agreements become useless or inoperative.

Illustrations.

(a) *Redman* v. *Redman* 1 Vern. 348. A father refused to give his daughter in marriage to a bridegroom, on the ground of the latter's being in debt. The brother of the bridegroom, in order to induce the consent of the bride's father, gave a bond for the debts, and the bridegroom secretly gave a counter-bond to his brother in order to indemnify him against the security.

* It is submitted that this equitable principle does not hold good in India, because the conception of conjugal rights and obligations is different in Indian law. But compare *Vaithyanathan* v. *Gangaraz* 17 Mad. 9, which lays down that such a contract is void. In Roman law, match-makers were allowed to sue on such contracts, but only to a limited extent.

† In India, the consent of parties not being an essential condition to a marriage, which is generally arranged by parents and guardians, a contract to pay a reward to the parent or guardian is not void. *Ranee Lallun Moner* v. *Nobi Mohun Sing* 25 W. R. 82; *Joggeswar* v. *Panchcowri* 14 W. R. 154; *Ram Chand Sen* v. *Aullalto Sen* 10 Cal. 1054.

Equity held the latter bond void, as a fraud upon the marriage, and ordered the bond to be delivered up for cancellation.

(b) *Gale* v. *Lindo* 2 Vern. 475. A brother, on the marriage of his sister, let her have a sum of money privately, in order that her fortune might appear as large as was insisted on by the other side. The sister gave a bond to the brother to repay it. The bond was set aside.

(c) *Neville* v. *Wilkinson* 1 Bro. C. C. 543. The creditor of the husband concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts. He was pre-prevented by an injunction from enforcing his debt.

(4) Contracts and conditions in restraint of marriage. A contract or condition in *general* restraint of marriage is void on the ground of public policy.

Contracts in general restraint of marriage are void, but in partial restraint of marriage are good.

But a contract or condition in *partial* restraint of marriage is valid, if reasonable.*

Illustrations.

(a) A condition not to marry A or B, or a widow, or a foreigner, or a domestic servant, is valid.

(b) A condition that a widow shall not re-marry, or that she shall enjoy a legacy during widowhood only, is valid.

(c) A legacy to a girl on condition that she shall not marry until she attains 21, is valid.

Especially if the restraint is imposed by a parent or other near relation, providing a reasonable safeguard against hasty, rash or improvident marriages, it will be enforced.

But a partial restriction is void, if it is in effect a general restriction, or is of so rigid a nature or so tied

Partial restriction when void.

* In India, an agreement even in partial restraint of marriage of any person, other than a minor, is void. See S. 26 of the Indian Contract Act.

up to particular circumstances that the party upon whom it is to operate is unreasonably restrained in the choice of marriage.

Illustrations.

(a) A condition that a person shall not marry until he attains 50 years of age, is void.

(b) When a legacy was given to a daughter, on condition that she should not marry a man who had not a clear income of £500 a year from an estate in fee-simple, it was a void condition, as leading to a probable prohibition of marriage.

Contracts in general restraint of trade void, but in partial restraint valid.

(5) **Contracts in general restraint of trade** are void, because such contracts have a tendency to promote monopolies, and to discourage industry, enterprise and just competition, and to deprive the public of the services and labours of a useful member.

But a partial restraint, *i. e.*, a special restraint not to carry on trade in a particular place, or with particular persons, or for a limited time, is valid, if in the opinion of the Court it is reasonable, on the ground that such a restraint leaves all other places, persons and times free to the party to pursue his trade or employment.*

(6) **Violation of public confidence** :—

Contracts for public offices.

(a) Trafficking in public offices. All contracts for the buying, selling or procuring of public offices must have a material influence in diminishing the respectability, responsibility and purity of public offices, and are opposed to public policy, for the public are

* Cf. s. 27 of the Indian Contract Act.

interested in seeing that its duties are performed by the best men available.*

(b) Stifling criminal prosecutions. An agreement for the compounding of a felony is void, because such an agreement has a tendency to subvert public justice. The principle is, as Lord Westbury puts it, "you shall not make a trade of felony. If the accused person is innocent, the law is abused for the purpose of extortion; if guilty, the law is eluded by a corrupt compromise, screening the criminal for a bribe."† Compounding felony.

(c) Maintenance and Champerty. An agreement to supply funds to another for carrying on litigation is opposed to public policy. *Maintenance* is the more general term; *Champerty*, which is more often met with, is a bargain whereby the one party is to assist the other in recovering property, and to share in the proceeds of the action. The champerty "must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary." ‡ Maintenance and champerty. When void.

* Cf. s. 23, Ill. (f) of the Indian Contract Act.

† But certain petty offences are capable of being lawfully compounded by the person aggrieved. See s. 245 of the Code of Criminal Procedure.

‡ *Fischer* v. *Kamala Naicker* 8 M. I. A. 187. Although the English law of champerty does not of itself apply to India, still champerty, in order to be illegal, must have the above qualities attributed to it by English law. See also *Ram Coomar Coondoo* v. *Chunder Canto Mukerjee* 2 Cal. 333 (P. C.); *Bhagwat Doyal Sing* v. *Debi Doyal Sahu* 25 Cal. 420 (P. C.).

When not.

But a present transfer of property for consideration by a person who claims it as against another in possession thereof, but who has not as yet established his title thereto, is not for that reason opposed to public policy.* "Nor is it opposed to public policy merely because the payment of the major part of the consideration is made to depend on the transferee's success in the suit to be brought by him to recover the property".† "Indeed, cases may easily be supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who has a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched." Moreover, mere inadequacy of consideration is not of itself sufficient to render a transaction champertous.‡

Fraudulent transfer of shares.

(7) *Frauds in relation to transfer of shares in joint-stock companies.* Generally speaking, such shares are transferable, the mode of transfer being that provided in the prospectus of the company; but a transfer with the object of merely getting rid of the liability for calls, is fraudulent. Also, if the directors have reserved the right of rejecting the transferee, any concealment or misrepresentation (materially affecting the worth of the transferee) would be fraudu-

* *Lala Achal Ram* v. *Kazim Hossain* 27 All. 271 P. C.

† *Bhagwat Doyal Sing* v. *Debi Doyal Sahu* 35 Cal. 430 P. C.

‡ For a lucid exposition of the whole law on the subject, see the judgment of Mukerjee, J. in *Gossain Ramdhan Puri* v. *Gossain Dalmir Puri* 14 C. W. N. 191.

lent and would make the transaction invalid even if the transferee has been accepted.

Investment by trustee in shares.

Where a trustee has invested the trust-money in the purchase of shares, the trustee who is the ostensible purchaser, is liable, and not the *cestui que trust.* But if the investment is proper, the trustee has the right of indemnity as against the *cestui que trust.* Where the shares are transferred to a trustee, only with the object of avoiding the liability for calls, the *cestui que trust* is liable.

Fraudulent transfers—*in pari delicto.*

[*Fraudulent transfers.* Where the parties are involved in an illegal agreement as above described, equity will not aid either of them as against the other, the general rule being, "*in pari delicto potior est conditio possidentis.*" Here each party keeps what he has obtained. Thus, if A and B enter into an agreement which is opposed to public policy, and in pursuance thereof A pays money to B, A shall not be allowed to recover the amount. But this rule is subject to some exceptions :—

Exceptions.

(1) Where the parties are not in *pari delicto, e. g.*, if one has acted under the fraud, surprise, undue influence, oppression, hardship or persuasion of the other, or there is great inequality of condition or age.

(2) Where, if one of the parties is allowed to retain the benefit of the illegal agreement, it would be to defeat the policy of the law.

(3) Where the agreement is opposed to public policy, the fact that one party is in *pari delicto* will

not disentitle him to relief, because it is the public that is being given relief through him.]

Abuse of a position of confidence.

II. Abuse of Fiduciary Relation.

Courts of equity do not sit as *custodes morum*, enforcing the strict rules of morality—but they do sit to enforce what has been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any admixture of imposition. Courts of equity will not, therefore, arrest or set aside an act or contract merely because a man of more honour would not have entered into it. But where a relation exists, which compels one to make a full discovery to the other, or to abstain from all selfish projects, equity will not suffer one party to derive an advantage from that circumstance, for it is founded in a breach of confidence. "The obtaining of property or any benefit through an undue abuse of influence by a person in whom a confidence has been reposed, is a fraud of the gravest character".

Why void.

Parent and child:

(1) **Parent and child.** All contracts and conveyances between parent and child, whereby the parent acquires a benefit, are jealously watched by Courts; and therefore if they are not entered into with the strictest good faith, or are not reasonable under the circumstances, they will be set aside. The onus of proving good faith and reasonableness is on the parent; and if he fails to discharge that onus, the transaction will be set aside as against him, or his assignee, not being an assignee for value without notice.

transactions set aside,

Similar is the principle with respect to persons standing *in loco parentis.*

except settlements,

But arrangements between father and son for the settlement of family estates, if the settlement be not obtained by misrepresentation or concealment of truth, if it is reasonable and the father obtains no benefit, are valid, even though the father has exercised his parental authority to procure its due execution [*Hoblyn* v. *Hoblyn* 41 Ch. D. 200].

which are not in the nature of a bounty.

But the case would be different, if the settlement is in the nature of a bounty from the son to the father soon after the son has attained majority.

Illustration.

Baker v. *Bradley* 7 De. G. M. & G. 594. A mortgage was made by the father and son immediately after the latter had attained majority, to secure debts due from the father, to some extent incurred in improving the property and in maintaining and educating the son. The son had no independent advice. *Held*, that the transaction could not be upheld as a family settlement.

Guardian and ward.

(2) **Guardian and Ward.** Transactions between the guardian and the ward would not be allowed to stand, if they take place during the continuance of the relationship, or so soon after its termination that the influence may be taken not to have completely ceased, unless the circumstances indicate the utmost good faith *(uberrima fides)* on the part of the guardian. For, in all such cases, the relationship is considered as virtually subsisting, especially if the duties attached to the situation have not ceased,—*e. g*, if the accounts between the parties have not been settled, or if the

estate remains in some sort under the control of the guardian. The Court watches such a transaction with extreme jealousy, and would not set it aside, even though there might not be any particular unfairness.

Reason. "It is put upon the danger, either of inducing guardians to flatter the passions of their wards, or of the improper exercise of their authority" [*Per* Sir Samuel Romilly in *Huguenin* v. *Baseley* I Wh. & T. L. C. 247.]

Quasi-guardians like medical advisers, spiritual guides etc.

Quasi-guardians. The rule is not confined to parent and child, or guardian and ward, but applies to all the variety of relations in which dominion may be exercised by one person over another *e. g.*, medical adviser, minister of religion etc.

Illustrations.

(*a*) *Dent* v. *Bennent* 4 My. & Cr. 269. A medical adviser, during the donor's illness, obtained from the latter a gift without consideration. The gift was set aside.

(*b*) *Huguenin* v. *Baseley* 2 Wh. & T. L. C. 247. A clergyman became acquainted with a widow, and undertook the management of her affairs. During the continuance of the relationship, he obtained from her a conveyance in his wife's name. The gift was set aside.

(*c*) *Allcard* v. *Skinner* 36 Ch. D. 145. The defendant was the lady superior of a sisterhood, of which the plaintiff was a nun. Plaintiff, by a voluntary conveyance, gave away all her properties in favour of the charitable objects of the sisterhood. *Held*, that the deed was executed through the influence of the lady superior.

(*d*) *Mannu Sing* v. *Umadat Pande* 12 All. 523. A gift of the whole of his properties by a Hindu, well-advanced in years, to his *guru* or spiritual adviser, the only reason for the gift (a

disclosed in the deed) being the donor's desire to secure benefit to his soul in the next world, was set aside.

(3) **Solicitor and Client.** It is obvious that such a relationship would give rise to great confidence between the parties; and therefore, gifts from clients to solicitors *pendente lite* are void, and thus incapable of ratification. But if it is for value, the transaction is voidable only, and will not be set aside after a long time, or after ratification. It must be noticed that the above rule of voidability does not apply to gifts by wills. A conveyance for value is thus liable to be set aside, unless the solicitor shows that he has acted with the utmost good faith, and has taken no advantage of his position. Solicitor and client.

Illustrations.

(a) *Proof* v. *Hines* C. T. T. 111. If a bond be obtained by a solicitor from a client who is poor and distressed, and the consideration does not appear to be full and fair, it will be set aside.

(b) Plaintiff, a spinster, made a voluntary settlement of leasehold premises to a solicitor, upon trust for herself for life, and thereafter upon trust absolutely for her niece, the solicitor's wife. It appeared that the defendant had acted as plaintiff's solicitor in respect of certain litigation about the property conveyed, without any remuneration, the plaintiff having promised to leave the property to the defendant's wife. The conveyance was set aside.

Similar is the rule with respect to solicitors' clerks.* Solicitor's clerk.

* In this country an attorney's managing clerk is in the same [illegible] *Harivalabh Das* v. *Bhai Jivanji* 26 Bom. 689.

Illustration.

Hobday v. *Peters* 6 Jur. N. S. 794. A solicitor's clerk, who was consulted by a lady in regard to a mortgage on her estate, by means of the knowledge thus acquired, was enabled to purchase the mortgage at much less than its amount. *Held*, that the lady was entitled to the benefit of the bargain.

Solicitor's remuneration.

[**Solicitor's remuneration.** If he is a trustee as well, he cannot charge in respect of that. But if he is a mortgagee, he may now charge the usual remuneration of a mortgagee.

An agreement between solicitor and client, that a lump sum shall be paid for past costs, is valid, if the agreement is in writing, and the terms reasonable.

An agreement to receive a fixed sum for future services is valid, if made in writing; but such a contract is liable to taxation as a bill of costs.]

Trustee and *cestui que trust.*

(4) **Trustee and Cestui que trust.** A trustee cannot sustain a gift from the beneficiary, unless the relationship has been completely dissolved, and the influence resulting therefrom has ceased. This, however, does not apply to gifts by wills.

But a trustee may purchase from the beneficiary, subject to his satisfying the Court that the transaction was fair and *bonâ fide.*

Principal and agent.

(5) **Principal and agent.** An agent cannot be a secret vendor or a secret purchaser of property which he is authorised to purchase or sell on behalf of the principal. Such a transaction will, at the option of the principal, enure for the latter's benefit.*

* Cf. S. 231 of the Indian Contract Act.

(6) **Counsel, auctioneers, &c., and their clients.** The same principles apply to the case of these persons, and all others standing in a fiduciary relation.* Counsel, auctioneers etc.

III. FRAUD UPON THE RIGHTS OF THIRD PERSONS. Fraud on third parties.

(1) **Common sailors.** Common sailors are reputed extremely improvident and liable to be imposed upon, and equity will grant relief whenever any inequality appears in the bargain, or any unfair advantage has been taken. Common sailors.

(2) **Bargains with heirs and expectants.** Equity relieves against the fraud which infects catching bargains with heirs, reversioners and expectants in the life of the father; for there is always fraud, presumed or inferred from the inequality of the parties—weakness of the one, and his want of sound advice, and advantage taken by the other of such weakness [*Chesterfield* v. *Janssen* 1 Wh. T. L. C. 289]. Bargains with heirs and expectants—fraud on the parent.

Remaindermen and reversioners, as well as persons having a mere hope of succession in the family property are 'expectant heirs' within the meaning of this doctrine [*Aylesford* v. *Morris* 4 Ch. D. 484]. Heirs include remaindermen and reversioners.

Generally speaking, mere inadequacy of price is in itself, no ground of setting aside a contract; but in the Inadequacy of price is a sufficient

* There is one species of constructive fraud which is common in India, but which is unknown to English law, *viz.*, the case of *Purdanishin* ladies—a class of persons especially exposed to undue influence. The burden of proving the *bonâ fides* of a transaction with such a person is on the party who affirms it. *Munshi Buzloor Ruheem* v. *Shumsoonissa Begum* 11 M. I. A. 551; *Geresh Chunder* v. *Kaggobutty* 13 M. I. A. 419, 431; *Sudisht Lal* v. *Shaharat* 7 Cal. 548 (P. C.); *Annoda* v. *Bhuban Mohini* 20 Cal. 546 (P. C.).

ground for setting aside sale of a reversion.

case of the sale of a reversion or remainder, mere inadequacy of price has long been considered in equity a sufficient ground of setting aside the transaction.

31 and 32 Vic, has left the equitable doctrine unaffected.

A recent statute (31 and 32 Vic. c. 4) has been passed, which provides that mere undervalue would not render the sale of a reversion voidable if it is *bonâ fide*. This statute has left unaffected the jurisdiction of courts of equity, owing to the requirement that, to make such sales valid, they must be *bonâ fide*, *i. e.*, there must be no fraud or unfair dealing. "For these changes of the law have in no degree whatever altered the *onus probandi* in these cases, which ... raise, from the circumstances or conditions of the parties contracting, ... a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of the circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence proving it to have been, in point of fact, fair, just and reasonable" [*Per* Lord Selborne, L.-C., in *Aylesford* v. *Morris* Ibid.]

Unconscionable nature of bargain, together with other facts, evidence of fraud.

(3) **Unconscionable bargains.** Where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of equity will throw the onus on the purchaser of proving that the transaction is fair, just and reasonable, and if he fails to establish that,

the transaction will be set aside [*Fry* v. *Lane* 40 Ch. D. 311].

Similar rules would apply, when the borrower is in distressed circumstances, and the lender takes advantage thereof to advance money at a high rate of interest.* High rate of interest.

Illustrations.

(*a*) When an heir to an estate, being in very straitened circumstances, borrowed Rs. 3,700 in order to prosecute a claim, and gave the lender a bond for Rs. 25,000 to be paid after receiving possession of the property, the Court gave a decree for Rs. 3,700 only, with interest thereon at 20 per cent. per annum [*Raja Mohkam Sing* v. *Raja Rup Sing* 15 All. 352 P. C.].

(*b*) A covenant in a mortgage-deed by an illiterate peasant to sell the mortgaged property to the mortgagee at a gross undervalue, in default of payment, was held inoperative.

(*c*) A spendthrift and drunkard, aged 18, covenanted to pay compound interest at 2 per cent. per mensem. The interest was much reduced [*Kripa Ram* v. *Sumi-ud-din* 25 All. 284].

(*d*) A talukdar, who had been declared a disqualified proprietor, and who estate had been taken charge of by the Court of Wards on the ground of his indebtedness, executed a bond for Rs. 10,000 with interest thereon at 18 per cent. per annum, and compound interest in default of payment by instalments. The Privy Council disallowed the compound interest. [*Dhun pal Das* v. *Muneswar Baksh Singh* 28 All. 570 P. C.] †

* Cf. S. 16, Ill. (*c*) of the Indian Contract Act.

† The law in India on this head is that a transaction would not be set aside merely because it is unconscionable, but it must as well be shown that the lender was in a position to dominate the will of the borrower; and it must be noticed that urgent need of money, on the part of the borrower does not, of itself, place the lender in a position to dominate the other's will. See *Sunder Koer* v. *Ram Sham Kissen* 34 Cal. 150 P. C.

Post obit bonds: what they mean.

(4) **Post obits.** A *post obit* bond is an agreement by an heir or expectant to pay to the lender a larger sum than the amount lent, on condition of the heir's surviving the ancestor on whose death the estate will come to his hands; but the transaction is to be void on the death of the borrower in the life-time of the ancestor. Such bonds operate as a virtual fraud upon the bounty of the ancestor, who is unwittingly made to give away his estate as a spoil to usurers, while supposing himself to be discharging the moral obligation of providing for his children. Post obit bonds would be set aside in equity, on condition of payment of the principal with reasonable interest—on the maxim that he who seeks equity must do equity.

Set aside in equity.

Illustration.

A, aged 30, borrowed £5,000 from B, upon giving him a bond for £10,000 to be paid off if A survived C, his grandmother, from whom he had great expectations, but not otherwise. The transaction was liable to be relieved against, if the relief was sought within a reasonable time [*Chesterfield* v. *Janssen* 1 Wh. and T. L. C. 289].

This principle also applies, on the same ground, to the case where an expectant heir, upon a present receipt of money, promises to pay over to the lender, a large, though an uncertain proportion of the property which might descend upon the death of his ancestor, if he should survive the latter.

Similarly, if tradesmen sell goods at extravagant prices to expectant heirs, equity will reduce the claims to a reasonable price.

(5) **Knowingly Producing a false impression.** For instance, when the owner stands by, and encourages another to sell the estate, and another is induced to purchase from that purporting seller—the true owner will be bound by the sale. This also applies to the sale of personal chattels. Knowingly producing false impression.

(6) **If a Man makes a representation in forgetfulness of the state of his title,** it is constructive fraud. Forgetfulness of title.

(7) **Agreements not to bid against one another.** At a sale by auction the bidder may expressly reserve the power of bidding himself, or of engaging puffers; but if he does it without expressly reserving this power, the sale would be voidable. Similar results would follow if two or more bidders agree not to bid against one another, and the property is knocked down at an inadequate price.* Agreement not to bid against one another.

(8) **Fraudulent composition-deed.** In a composition-deed among creditors, the relinquishing of a portion of his claim by one creditor is consideration for a similar relinquishment by the others, and therefore if a creditor, who is a party to a composition-deed, secretly stipulates for some benefit to himself over and above that secured by the deed, it is a fraud on the other creditors; and money paid under such a secret agreement may be recovered back. Fraudulent composition deed—fraud on other creditors.

(9) **Gifts.** A person obtaining a gift from another must always be prepared to show its *bond fides*; in Donee of a gift must be prepared to show its *bona fides*.

* But Cf. *Ambika Prasad* v. *Whitwell*, 6 C.L.J. 111 and *Gobinda Chandra* v *Shyam Lal*, 1 C. L. J. 85.

other words, that the donor deliberately performed the act, knowing its nature and effect on his interest.

Power of appointment must be honestly exercised.

(10) **Exercise of a power of appointment.** A power of appointment must be exercised *bonâ fide*, and for the object of the appointment; and therefore any appointment whereby some benefit is secured to the donee of the power of appointment (*i. e*, the person authorised to make the appointment) is a fraud.

Illustrations.

(*a*) A power is given to A to make an appointment among his children—to all or any of them, by deed. A appoints to his eldest son only, such son covenanting to pay a portion of the fund to A. This is fraud.

(*b*) In the same case, A appoints only to B, a consumptive child, to the exclusion of the others, expecting to inherit the property as his heir on the child's death. This is fraud.

Illusory appointments—

Similar consequences followed from *illusory* appointments, by giving to one child a nominal and not a substantial share—or, as the phrase was, "cutting him off with a shilling." Such an appointment was invalid; but now by 37 and 38 Vic. c. 27, the donee has the power of "cutting him off with a shilling," or even without a shilling—*i. e.*, of excluding one or more persons altogether, unless the instrument creating the power shall declare the amount or share from which no object of the power shall be excluded.

now valid, except where minimum is stated.

Moreover, when a parent is given the power to raise portions for his children, and he appoints to a child during minority, while he is not in want of that

raising portions during minority.

portion, and the death of the child is expected at that time, the parent will not be allowed, as heir of the child, to inherit the property, if the child dies a minor. The reason is, as stated by Lord Thurlow, "the meaning of a charge for children is that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time."

Release of the power valid.

A father having a power of appointment among his children may validly *release* it, even when he derives some advantage from it. The release must be by deed.

Illustration.

Smith v. *Somes* (1896) 1 Ch. 250. A, the father, has a power of appointment among his children and grandchildren, in default of which the children would be entitled to the estate. All the children die, except a daughter, who has children. Now A may appoint to either the daughter, or to her children, and in default of appointment the daughter alone would get the estate. A releases the power in favour of the daughter, and A and the daughter jointly execute a mortgage of the estate, to secure an antecedent debt of A alone. The release is valid, because A was under no obligation to exercise the power.

Otherwise where power is coupled with duty.

But a power "coupled with a duty" (*i. e.*, in the nature of a trust) cannot be released.

Covenant not to exercise a power.

A covenant not to exercise a power, or to exercise it only in a specified way (*e. g.*, only in favour of A, B and of no other, is valid, but such a covenant cannot be specifically enforced, and the only remedy would be damages for breach thereof.

Represents

(11) Where a man represents a certain state of facts

tion as an inducement to a contract.

so as to induce another to enter into a contract, he cannot resile from that, even if the circumstances have altered.

Illustration.

A, the owner of an estate X near a sea, takes a lease of the beach which intervenes between his estate and the sea for 999 years, the lease containing a stipulation that he shall not build over it. A grants a building lease of his estate X to B, representing to him that A could not, owing to the restriction in his lease, build on the beach so as to obstruct the sea-view, which was, of course, correct. B builds over estate X. Afterwards A surrenders his lease of the beach to the landlord, and takes a fresh lease, which contains no restriction as to building. Equity would restrain A by an injunction from building on the beach.

CHAPTER VII.

SURETYSHIP.

'Suretyship' defined.

Differs from an indemnity.

Definition. A *suretyship or guarantee* is a promise to pay the debt or perform the promise of another *in case of his default.** (It differs from an *indemnity* which is a promise to save the promisee harmless from loss arising from a transaction into which the latter has entered at the instance of the promisor.)†

Must be in writing.

How made. By the Statute of Frauds, a contract of guarantee must be in writing (but not a contract of indemnity).

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* Cf. S. 126 of the Indian Contract Act.

† S. 124, Ibid.

Its nature. A suretyship is not, in its inception, a contract *uberrimæ fidei*, like insurance for instance; but once the contract has been entered into, the surety is entitled to be kept informed of everything which is likely to affect his willingness to continue the suretyship.

Whether it is a contract *uberrimæ fidei*.

Illustration

A, the manager of a firm, suspects the honesty of B, an assistant, and threatens him with dismissal unless a man of substance stands surety for him. C consents to stand surety. Now A is not bound to disclose to C the facts on which his suspicions were aroused. But if, after the suretyship, A discovers fresh instances of dishonesty on B's part, he is bound to communicate them to C.

Rights of creditor against surety. These rights are wholly contractual, that is to say, are entirely regulated by the written instrument, so far as that goes. Thus the suretyship may be a continuing one, that is to say, may extend to a series of acts, or may be limited to a solitary act; it may be for the whole or for a part (*i e*, up to a specific amount) of the debt; it may be made terminable by the death of the surety, or by notice.

Creditor's rights are governed by the instrument.

In the absence of a contract to the contrary, the creditor may proceed against the surety in the first instance, without proceeding at all against the principal debtor. But the surety may perhaps compel the creditor, upon giving sufficient indemnity against his costs of the suit, to proceed against the principal debtor.

Surety's remedies.—Right to be indemnified.

Remedies of surety. (1) He may pay off the creditor, and may realize from the debtor the money he has himself paid together with costs, if any.

This right of being re-imbursed is based on an implied contract*.

(2) On such payment, he is invested with all the rights and remedies of the creditor, and is entitled to the benefit of the creditor's securities.†

(3) He may, also maintain an action against the creditor for delivery of the securities.

(4) He may, perhaps, compel the creditor, upon giving security, to proceed against the debtor in the first instance, as above stated.

(5) He may sue for a judicial declaration that he is discharged, under the circumstances stated below.

(6) If there are co-sureties, he may sue them for contribution. This doctrine of compensation is based on the general principles of justice (because he has relieved them from a common burden) and not on contract, although contract may qualify it.

Who are co-sureties.

Co-sureties. Two or more persons are said to be co-sureties when they are liable for the same debtor and for the same debt, whether under the same or under different instruments, or whether in the same sum or in different sums. Further, a surety is entitled to claim contribution against his co-surety, even if, at the time when he became surety, he was ignorant of the existence of the other, and thought he was

* See S. 145 of the Contract Act.

† S. 141, Ibid.

alone bound (*Dering* v. *Winchelsea*, 1 Cox. 318).* But when the same debt is split up into parts, and two or more sureties are responsible for such distinct parts, they are not co-sureties for different debts.

A surety who holds a special security is bound to bring the same into hotchpot for the benefit of his co-sureties as well, for the principle of suretyship requires that the benefit and the burden shall be equally distributed over all.

Illustration.

A, B and C are sureties for D. A has consented to be a surety on taking security from D, but B and C hold no such security. A alone pays the debt, and sues B and C for contribution. B and C, if they are compelled to pay their shares, may call for that security for their common advantage.

Right of contribution based on equity.

Contribution. When a surety has paid off the creditor, he is entitled to contribution from the other solvent sureties, to the amount for which the latter have made themselves liable.†

Surety's discharge :— (1) Variance in the terms of the contract.

Circumstances discharging surety:—(1) If the debtor and creditor have varied the terms of the contract without the privity of the surety, and thereby have prejudiced the position of the surety.‡

Illustrations.

(*a*) B, the tenant, agrees with A, the landlord, to pay him yearly a particular sum as rent, and C becomes the surety for the payment thereof. Afterwards A and B enter into a fresh contract, by which B surrenders the old lease, and takes a new lease at a higher rent. The surety is discharged.

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* Cf. S. 145, 147 of the Indian Contract Act.

† Cf. S. 147 of the Indian Contract Act.

‡ S. 133, Ibid.

(*b*) A engages B as his clerk, and C guarantees B's honesty. Afterwards A engages B as his cashier. C is discharged.

But if the variation is not at all material, or does not increase the responsibility of the surety, it will not operate by way of his discharge.

(2) Giving time in a binding manner.

(2) If the creditor gives time in a binding manner, or agrees not to sue the debtor, thereby affecting the eventual remedies of the surety.*

Illustration.

B, the debtor, agrees to pay a debt to A by three annual instalments. C is the surety. A gives B time for the first instalment. C is discharged, but only with respect to the first instalment, and not the two subsequent instalments.

Exception. (*a*) Mere forbearance to sue does not discharge the surety †

(*b*) If by the creditor's giving time to the debtor, the surety's remedies are not diminished, but accelerated, he will not be discharged.

(*c*) If the giving of time is provided for in the instrument of suretyship, the surety will not be discharged.

(*d*) If, when giving time, the creditor reserves his rights against the surety, the latter is not discharged; for, the creditor may proceed against the surety the very next moment, and the surety may then proceed against the debtor inspite of the grant of time by the creditor—so that the surety's remedies will remain unaffected.

(3) Release of the principal debtor.

* S. 135, Ibid.

† S. 137, Ibid.

(3) If the creditor releases the principal debtor, the surety is discharged. For such a release virtually operates as a release of the surety also; otherwise the surety, if he is compelled to pay, would realise from the debtor, and the ostensible release would be infructuous.*

Exception. If the creditor, while releasing the debtor, reserves his right against the surety, the surety is not released, and the apparent release is no release at all. But not a release of debtor, while reserving right against surety.

(4) If the creditor releases one surety, even when acting under a mistake of law that the others would remain bound, they are discharged† [see Page 35, Ill. (c)]. But such a discharge would not have the effect of relieving them from payment of their shares of the original debt, upon an equitable apportionment of it, although they are no longer responsible for the whole debt. (4) Discharge of a co-surety.

(5) If the creditor releases security, or allows them to come into the hands of the debtor, the surety is discharged. For, the securities ultimately enure for the benefit of the surety, and if they are not forthcoming, the surety is discharged to the extent of their value.‡ (5) Release of securities.

Debtor's bankruptcy. If the debtor has become a bankrupt, the creditor and the surety are each entitled to prove in bankruptcy—the creditor, in respect of his debt, and the surety, in respect of his liability. Debtor's insolvency—who can prove?

* Sec S. 134 of the Indian Contract Act.

† Cl. (3. 138, Ibid.

‡ S. 141, Ibid.

But—(a) If the surety is a surety for the whole debt, the creditor alone shall prove, as well for himself (in respect of his debt) as for the surety in respect of his liability: and after receiving the dividends on both the counts, may proceed against the surety for the residue, if any, or if the sureties are more than one, against them *pro rata* for the residue, or against one of them only, leaving him to recover compensation from his co-sureties in proportion to their liability for the residue.

(*b*) Where the surety is a surety for an aliquot part of the debt, and he has paid that part off, then he may prove in respect of that part, and the creditor in respect of his whole original debt, and each keeping to himself the dividends received by him. But the creditor cannot, of course, receive more than 20 shillings in the pound altogether. And so also, when the sureties are two or more.

Limitation.

Limitation. If the claim of the creditor against the principal debtor is barred by limitation, his claim against surety is also extinguished.

Debtor may, by payments, keep alive debt against surety.

But the principal debtor may, even without the consent of the surety, make payments to the creditor, and thereby keep alive the debt against himself as well as against the surety. The case thus differs from that of co-debtors, for a payment by one debtor does not keep alive the debt as against the co-debtor if made without the latter's consent. *

* See S. 21 (2) of the Indian Limitation Act.

CHAPTER VIII.

PARTNERSHIP.

Partnership. Remedy at law, and in equity.

The remedy at Common law in partnership matters was very meagre and insufficient; and moreover, where discovery was prayed for, or an account or dissolution needed, Common law could not grant any relief. The jurisdiction of equity, therefore, though nominally concurrent, was almost exclusive, and the Judicature Act has assigned to the Chancery Division all partnership matters involving accounts or dissolution.

Partnership Act.

The present law in England as to partnership is the Partnership Act, 1890 (53 and 54 Vic. c. 39); but s. 47 of that Act declares that the rules of equity or Common law applicable to partnership shall continue in force except so far as they are inconsistent with the provisions of that Act.

Contract to enter into partnership when specifically enforced.

Reliefs granted by equity:—(*a*) *Contract to enter into partnership.* Usually such a contract will not be specifically enforced, because a mutual confidence being of the essence of partnership, a partnership which begins with mutual distrust and disinclination on the part of some, cannot be expected to be carried on with success.

Again, if A and B contract to enter into partnership for a fixed period, the contract providing that it would not be terminable by the death of either of them, and A dies, B cannot compel A's executors to enter into

the partnership, although he may claim damages against the estate.

But where (a) the contract is for a specified term, and (b) there has been part-performance, equity will grant specific performance—but not where it is to be of unlimited duration, or where it is completely executory.

Injunction sometimes granted.

(*b*) *Injunctions.* (1) Equity will in some cases compel specific performance of particular clauses in the deed of partnership.

Illustration.

A, B, C and others enter into a partnership agreement, the agreement providing that the name of the firm shall be "A, B, C. & Co." A and B style the firm as "A, B, & Co.", thus excluding C's name therefrom. C can obtain an injunction on A and B, forbidding them to use any name of the firm which does not contain C's name.

(2) Equity will, by injunction, enforce any clause in the deed, whereby any partner is prevented from carrying on *any* business, or any *rival* business, as the case might be. Further, in the absence of any stipulation to the contrary, equity will restrain the carrying on of any rival business by any partner during the continuance of the partnership.

Reference to arbitration.

(3) Equity will not interfere in a matter which according to the agreement, is to be referred to arbitration; and a provision to refer disputes to arbitration will be a bar to a suit on the same matter,* and will be specifically enforced.

* Cl. 8, 28, Exception (2) of the Indian Contract Act.

Constitution of partnership It is constituted by agreement, whether express or implied.

A partnership is said to exist between two persons when they have agreed to combine their capital, labour or skill in a business for the purpose of profit. Therefore, when two persons have agreed to purchase land as joint-tenants or tenants-in-common, there is no partnership, because there is no business. An infant may become a partner. 'Partnership' defined.

Usual terms of partnership —In the absence of a contract to the contrary, the partners have an equal share in the partnership capital, as well as in the profits and losses. * Equality of interest.

Illustration.

A and B enter into a partnership, A advancing a certain sum of money as his capital in the business, and B giving a cotton-mill, taken at its then value, as his capital. After the partnership has been dissolved, it is found that the mill is worth twice its original price. *Held*, that the excess in the value is the profit, and divisible equally between A and B.

If the partnership continues after the expiry of the specified term, it becomes a partnership at will.

Dissolution. I. *By operation of law*:—*(a)* By the death or lunacy of a partner, unless there is an express stipulation to the contrary.† Dissolution by operation of law *e. g.*, insolvency, death or felony of a partner &c.

(b) By the insolvency of a partner.‡

(c) By the conviction of a partner for felony.

* Cf. S. 253 (1) of the Indian Contract Act.

† Cf. S. 253 (1, b) and S. 251 (1) of the Indian Contract Act.

‡ S. 251 (2) Ibid.

[An assignment by one of the partners to a stranger will not now work a dissolution.]

(*d*) By any event which makes the partnership itself or its objects illegal. *

Illustration.

A and B enter into a partnership to export coal to France. A war afterwards breaks out between England and France. The partnership is dissolved.

By efflux of time.

II. **By efflux of the time** fixed for its duration—after which, if the partnership continues, it is a partnership at will.

By mutual agreement.

III. **By agreement of all the partners**, or of one or more of them, if there is a provision in the partnership-deed to that effect.

By giving notice.

IV. **By notice.** Where it is for an indefinite term, any member may, by giving reasonable notice to the others, determine it, provided he was acting honestly, and not capriciously or wantonly. The partnership will then continue, only so far as is necessary for its winding up. †

When just and equitable.

V. **When just and equitable.** "Whenever in any case circumstances have arisen, which, in the opinion of the Court, render it just and equitable that the partnership be dissolved" [S. 35 of the Partnership Act].

When a partner

VI. When a partner becomes permanently incapable of performing his part of the contract. ‡

* S. 255, Ibid. † S. 254 (5) Ibid.

‡ S 254 (4) of the Indian Contract Act.

VII. When a partner has been guilty of such conduct as is, in the opinion of the Court, calculated to prejudicially affect the carrying on of the business, or persistently commits a breach of the partnership agreement. * becomes permanently incapable.

VIII. Where the business of the partnership can only be carried on at a loss. †

Incidents of dissolution:—(1) *Accounts.* Upon a dissolution, or with a view to a dissolution, an account will be decreed. If there is a clause in the partnership agreement that the 'last signed' account will be conclusive, the Court will observe it. Incidents of dissolution. Accounts.

(2) *Receiver.* A receiver may be appointed to wind up the partnership-business, or with a view to its sale as a going concern—but not with a view to derive profit from it—for that would be a carrying on of the business by the Court. Receiver.

(3) *Return of premium.* In a proper case the defendants may be ordered to repay to the plaintiff a due proportion of the premium paid by him in consideration of his having been taken as a partner. Return of premium.

(4) *Option-clause.* The Court will enforce an option-clause, if any, in the partnership-articles, which means a provision, whereby the remaining partner or partners have the right of buying out the retiring partner. Option-clause to be enforced.

(5) *Distribution of assets.* By S. 44 of the partnership Act, the following rules must be observed in the distribution of the assets :— Distribution of assets.

* S. 254 (5) Ibid. † S. 254 (6), Ibid.

(*a*) The liabilities of the partnership must be first paid off;

(*b*) Next, the costs of the action;

(*c*) Thirdly, all advances made by the partners individually, over and above the capital;

(*d*) Fourthly, the capital of the partners; and

(*e*) The residue, being the profits of the business, shall be distributed among the partners in proportion to their share in the profits.

(6) *Legal representatives of a deceased partner.* If after the partnership is dissolved by the death or insolvency of a partner, but before the partnership business is wound up, if the other partner or partners carry on the business, they are liable to account for the profits they have so made to the legal representatives, or to the assignee in bankruptcy, as the case might be. There is no fiduciary relation between the survivors and the legal representatives of the deceased, so as to save the latter's rights from the Statutes of limitation, the rights of the latter being legal only, and not equitable. They have no lien in the partnership estate, so that the estate, which accrues in its entirety to the survivors, may be mortgaged or charged by them. Such mortgagee will have priority over the legal representatives in respect of the partnership estate. But in bankruptcy, on the contrary, the interest of the bankrupt vests in the assignee.

On the death of a partner, the survivors are not trustees for the legal representatives of the deceased, but the latter may sometimes claim account.

(7) *Debts.* The rule is, that partnership debts must be first paid out of the partnership assets, and the separate debts of a partner must be paid out of his

Partnership debts to be first paid out of the

se parate estate in the first instance.* When a creditor obtains judgment on a separate debt, he may, subject to the above rule, execute it against the partnership estate, and the Court shall make an order charging the partner's share with the debt, and shall appoint a receiver towards the realization of such charge. partnership, and separate debts of a partner out of separate property.

(8) *Good-will.* The good-will of a business is an asset of the partnership, and available as such for the benefit of all the partners. On the retirement of a partner, if he executes an assignment of his interest in the firm, the assignment shall include the partnership style, including the name of the retiring partner. Otherwise the remaining partners cannot continue to use the old partnership style. The retiring partner may start a *rival* business (unless he is restrained by a contract), but cannot solicit or canvass the customers of the old firm. Good-will is an asset of the firm. Setting up rival business.

Limited partnership. By the Limited Partnerships Act, 1907, (7 Ed. VII c. 24) any number of persons, not exceeding ten in the case of a banking partnership, and not exceeding twenty in other cases, may enter into a limited partnership—one or more of them (called *general partners*) being liable for the partnership debts and liabilities in the ordinary way, the others (called *limited partners*) being liable only to the extent of their capital in the business. Such a company must be registered. A limited partner cannot withdraw his capital, but may assign his share with the assent of the general partners. A limited partner Limited partnership —what it is. Its incidents.

*Cf. S. 252 of the Indian Contract Act.

cannot interfere with the management. A general partner may, after notification in the *London Gazette*, convert himself into a limited partner. The partnership will not be dissolved by the death, insolvency or assignment by a limited partner; but the court may dissolve the partnership on the same grounds as in the case of a Limited Liability Company. In all other respects such a partnership is like an ordinary partnership.

CHAPTER IX.

ACCOUNT.

Account at law.

The Common law had jurisdiction in matters of account only in two sorts of cases:—(1) where there was a *privity in deed*, e. g., as against a bailiff or receiver appointed by the party, or when there was *privity in law*, e. g., against a guardian in socage; and (2) as between merchant and merchant, by the law merchant. So that an action of account did not lie against executors and administrators, or against a joint-tenant or tenant-in-common. Moreover, the mode of proceeding in an action of account at law was difficult, dilatory and expensive.

and in equity.

From the inadequacy of the remedy at law, equity began to assume jurisdiction in matters of account from the very early times, and now, even in matters of account arising from privity of contract, courts of equity have a general jurisdiction where there are

mutual accounts, as well as where the accounts are one-sided and a discovery is sought.

Principal and agent.

(*1*) *Principal against agent.*— Where there is any fiduciary relation like agency, equity would decree an account in favour of the principal against the agent, who was made to account as well for the secret profits he had made. But the agent could plead that the claim had been barred by limitation, unless where there has been an express trust, which, as we have seen before, is unaffected by the Statutes of limitation.

But an agent could not in equity claim an account from the principal for his commission and other remuneration.

Patentee could proceed against infringer either for damages, or for accounts.

(*2*) *Patentee against infringer.*—If a person has infringed a patent, the patentee had the right in law to claim damages. But he could also adopt the act of the infringer, thus making him an agent, and claiming from him an account of all the profits he has made by the infringement. [This is a particular application of the rule against all tort-feasors, for the injured party may elect either to claim damages, or an account of the profits made by the tort-feasor from the wrong.]

When a bailee recovered damages from a trespasser, he had to account to the bailor.

(*3*) *Bailor against bailee.*—If a third party commits a tort to the property bailed, and the bailee has recovered damages, the bailor may claim from the bailee an account of the damages so received, although the bailee would not at all be personally liable to the bailor for the tort.

Trustee

(*4*) Cestui que trust *against trustee.*—This relation may properly be deemed a confidential agency, and liable to

account, even for secret profit.

is within the appropriate jurisdiction of equity. A trustee is never permitted to make any profit to him in any of the concerns of the trust. Thus, if he employs the trust-money in speculation, he is liable to account for the profits he has so made; but on the other hand, the losses, if any, from the speculation, will fall on him personally. And if he mixes the trust-money with his own money, and makes profit by speculation, the *cestui que trust* may, at his option, recover a proportionate part of the profits.

Mortgagee selling out of court bound to account for sale-proceeds.

(5) *Mortgagor against mortgagee.*—If the mortgagee sells (out of court) the mortgaged property under the power of sale contained in the mortgage, he is liable to account to the mortgagor for the purchase-money he has so received.

Account between joint-tenants.

(6) *Tenant against co-tenant.*—If one joint-tenant or tenant in-common receives all the profits, he is bound to account to the others for their respective shares, after deducting the proper charges and expenses. For, in such a case, the remedy is a suit for account, and not for trespass or injunction, unless there has been an actual ouster.

Mutual accounts—what they mean.

Mutual Accounts. Equity also assumed jurisdiction over matters of mutual accounts, that is, where each of the two parties has received and also paid on the other's account.

Action for equitable waste.

Waste. Generally, actions for waste were cognizable at law, but when the matter to which the account was incident was wholly equitable—e. g., equitable

waste, such as the cutting down of ornamental timber by a tenant, equity entertained the action.

Now, after 21 and 22 Vict. c. 27, an account of damages or of profits instead of damages, is an almost invariable incident to every injunction.

Chief defences to an account-suit:—(*1*) *Account stated.*—Ordinarily it is a good bar to an action for an account, that the parties have already in writing stated and adjusted the items of the account and struck off the balance. In such a case, a Court of equity will not interfere, for, under such circumstances, an action upon a stated account lies at law, and there is no ground for resorting to equity. If, therefore, there has been an account stated, that may be set up as a plea, as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a Court of equity. But if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a Court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined. And this reopening of account may be of several degrees:—(a) In some cases, as of gross fraud, or gross mistake, or undue advantage or imposition, made palpable to the court, it will direct the whole account to be opened, and taken *de novo*. (b) In other cases, where the mistake is not shown to affect all the items of the transaction, the Court will content itself with a more moderate exercise of

Defences to an account-suit:—

(1) account stated.

Stated account will not be lightly reopened,

but may sometimes be "surcharged and falsified."

its authority: it will allow the account to stand, with liberty to the plaintiff to "surcharge and falsify" it, the effect of which is, to leave the account in full force and vigour as a stated account, except so far as it can be challenged by the opposite party, who has the burden of proof on him to establish errors and mistakes [*Pitt* v. *Cholmondeley* 2 Ves. 565]. A *surcharge* supposes credits to be omitted which ought to have been allowed. A *falsification* supposes that a particular item is wholly false, or in some part erroneous.

What is meant by a stated account.

What shall constitute a stated account in the sense of being a defence in equity, is in some measure dependent upon the particular circumstances of the case. An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary clause, that errors and omissions are excepted. But in order to make an account a stated account, it is not necessary that it should be signed by the parties. *It is sufficient if it has been examined and accepted by both parties.* And this acceptance need not be express, but may be implied from circumstances. An account rendered shall be an account stated, from the presumed acquiescence or approbation of the parties, unless an objection is made thereto within a reasonable time; and what is a reasonable time is to be determined by the circumstances of each case.

(2) Account settled.

(2) *Account settled.*—Upon like grounds a settled account will be deemed conclusive between the parties,

unless some fraud, mistake, omission or inaccuracy is shown. For it would be most mischievous to allow settled accounts between the parties to be ripped up, unless for urgent reasons, and under circumstances of plain error, which ought to be corrected. And, in cases of settled accounts, the court will not generally open the account, but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud.*

(3) *Limitation.*—When the demand was strictly of a legal nature, or might be one which is cognizable at law, Courts of equity strictly observed the rules of limitation. But where the demand was of a purely equitable nature, equity acted in analogy with law, and refused to interfere after a considerable lapse of time

(3) Lapse of time.

(4) *Laches and acquiescence.*—If a person has long slept over an account submitted, without expressly objecting to it, equity is unwilling to interfere, except in cases of manifest fraud.

(4) Laches and acquiescence

* See the case of *Shamuldhone Dutt* v. *Lakshimani Devi* 36 Cal. 493.

CHAPTER X.

SET OFF, APPROPRIATION OF PAYMENTS, AND APPROPRIATION OF SECURITIES.

I. SET-OFF*.

'Set-off' at law.

Set-off at law. At Common law there was originally no right of set-off at all. When two parties had cross-demands against each other, each had to sue and recover separately, in separate actions, owing to the forms of proceeding and the convenience of trial. But "natural equity says that cross-demands should compensate each other, deducting the less sum from the greater; and that the difference is the only sum which can be justly due." Afterwards the "Statutes of Set-off" (4 Anne. c. 17; 2 Geo. 2, c. 22; 5 Geo. 2, c. 30 and 8 Geo. 2, c. 24) were passed, which recognized the right of set-off in bankruptcy and other cases.

Statutes of set-off.

'Set-off' in equity:—

Set-off in equity. Equity, however, independently of the Statutes of Set-off, granted relief in the following cases:—

(1) Where mutual credit.

What it means.

(1) In the case of mutual independent accounts where there was mutual credit. Equity did not allow a set off merely because there were independent cross-claims. But if there was mutual credit, equity

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* In India the rules and limitations with respect to *legal set-off* are contained in O. 8, R. 6 of the Code of Civil Procedure (Act V of 1908), which has incorporated many principles of equity. What is known in India as *equitable set-off* is in respect of *unliquidated damages* arising out of the same transaction—*Clark* v. *Ruthnavelo* 2 Mad. H. C. 396.

† *Per* Lord Mansfield in *Green* v. *Farmer* 4 Burr. 2220, at p. 2221.

relieved. By "mutual credit" is meant a knowledge on both sides of an existing debt due to one party, and a credit by the other party founded on, and trusting to, such debt, as a means of discharging it.

Illustration.

A is indebted to B in the sum of Rs. 10,000, on bond, and B borrows of A Rs. 2,000 on his own bond, the bonds being payable at different times. The nature of the transaction would lead to the presumption that there is a mutual credit between the parties as to the sum of Rs. 2,000, as an ultimate set-off, as far as that will go, against the debt of Rs. 10,000. If the bonds are both payable at the same time, the presumption of such a mutual credit will be converted almost into an absolute certainty. Here equity will allow set-off, though the law would not.

(2) *Where the defendant has some specific equitable ground, even where the claims are independent.* Thus equity would allow set-off where there are cross-demands, one of which is legal and the other equitable, under such circumstances that had both the debts been legal, a set-off would have been permitted at law. (3) Where special equity.

Illustrations.

(*a*) A is the creditor, and B the debtor, in respect of a legal debt. C, who has a chose in action (e. g., a debt) against A, assigns it for value to B. Here B has an equitable claim against A, for a chose in action is not transferable at law, but transferable in equity. A sues B in respect of the legal debt. B can set-off in equity the (equitable) chose in action.

(*b*) The assignee of a chose in action takes it subject to all claims of set-off by the debtor."*

Exception 1.—But a set-off may be cut off by an intervening equity. Exceptions.

* See S. 132, Ill. (i) of the Transfer of Property Act.

Illustration.

A shareholder in a limited company, who is also a creditor of the company, cannot, when the company is being wound up, claim to set-off his debt against any unpaid calls, because the rights of the general creditors have intervened.

Exception 2.—The assignee of a negotiable instrument holds it free from set-off.

A debt to the estate may be set-off against legacy.

Debt against legacy. The executor or administrator may set-off a debt owing to the estate from a person against any legacy claimed by the latter, although the debt may be time-barred.

Solicitor's lien would not affect a claim to set-off.

Solicitor's lien. A solicitor's lien will not now affect the right of the other party to a set-off.

Illustration.

A sues B for Rs. 1,000. B engages C, a solicitor, to act for him in the litigation. A obtains a decree against B for the amount, but B is awarded his costs to the extent of Rs. 200. Now C, the solicitor, has a lien on the costs of Rs. 200; still A has the right to set-off his decree of Rs. 1,000 against B's costs of Rs. 200, and to execute a decree for Rs. 800 against him.

Set-off in bankruptcy.

Set-off in Bankruptcy. In bankruptcy if there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any of his creditors, the creditor will be allowed to set off his claim against any claim of the bankrupt; and this embraces even unliquidated damages claimed by the creditor.

Where no set-off: independent accounts.

No set-off.—(1) Where the debts are independent and no mutual credit, or no equity, as stated above.

(2) When the debts accrue in different capacities.* Claims in different capacities.

Illustration.

A dies, leaving B his executor, who, as such, sues C, a debtor to A's estate. C cannot set-off a debt against B personally.

But in exceptional circumstances, this would be allowed. Exception.

Illustration.

In the above illustration, B is not only the executor, but also the residuary legatee. After the estate has been administered, B sues C. C can claim a set-off.

(3) Where money has been received for a specified purpose, no set-off would, generally speaking, be allowed against it. Money received for a specified purpose.

Illustration.

A is the solicitor, and B the client. A has a bill of costs against B. B pays A a sum of money for depositing the same in Court. B cannot apply such money towards his own costs.

(4) Where the claim is not actionable, there would be no set-off. When claim is not actionable.

Illustration.

A debt which is barred by limitation cannot be set-off.†

(5) A joint-debt cannot be set-off against a separate debt, or a separate debt cannot be set off against a joint-debt. Joint-debt against separate debt, and *vice versa*.

Illustrations.

(a) A and B sue C for Rs. 1,000. C cannot set-off a debt due to him by A alone.‡

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* See O. 8, R. 6, Ill. (*a*) and (*b*) of the Code of Civil Procedure (Act V of 1908.)

† See *Brijlal* v. *Maxwell* 7 All. 284.

‡ Civil Procedure Code, (Act V of 1908), O. 8, R. 6. Ill (*f*).

(*b*) A sues B and C for Rs. 1,000. B cannot set-off a debt due to him alone by A.*

How a payment is to be appropriated.

II. Appropriation of Payments.

When there are several debts due from the debtor to one and the same creditor, and a payment is made,

The question sometimes becomes material.

the question often arises, to which of the debts shall the payment be appropriated, for there might be a surety with respect to one of the debts, or some of the debts might not be legally recoverable. Now

General rule of appropriation:—

with respect to appropriation, the general rule is this —the debtor has, at the time of payment, the option of appropriating the payment; in default, the creditor has a right of election; in default of either, the law will make the appropriation.

The debtor may make election at the time of payment.

(1) The debtor must make the election at the time of payment, and this election may be either express or implied, that is, under circumstances implying that the payment is to be applied to the discharge of some particular debt.†

Illustration.

A owes B, among other debts, Rs. 1,000 on a promissory note which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays B Rs. 1,000. The payment is to be applied to the discharge of the promissory note.

In default, creditor may appropriate.

(2) If the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment was intended to be applied, the creditor may apply it, at his discretion, to any lawful

* Civil Procedure Code (Act V of 1908) O. 8, r. 6, Ill. (a).

† See S. 59 of the Indian Contract Act.

actually due, notwithstanding that the debt is barred by limitation.*

(3) If neither the debtor nor the creditor has made any appropriation, the law appropriates the payment to the earliest debt, according to *the rule in Clayton's case.* In default of either, law will appropriate to the first debt.

* The facts of that case were as follow :—A, B and C were partners in a banking firm. D had a running account in the bank. A died. At his death D had £1,713 in the bank D continued his dealings with the bank, and drew out, by cheques, sums to a larger amount than £1,713. He also paid in from time to time sums to a still greater amount. Afterwards B and C, the surviving partners, became insolvent. The question was, whether A's estate was liable to D for £1,713. *Held,* that the sums drawn out by D after A's death were appropriated by the law to the payment of the balance of £1,713, so that A's estate was not liable The bank is the debtor, D the creditor, and £1,713 the earliest debt; and subsequent payments went to discharge this earliest debt. The sums afterwards paid in by D constituted fresh debts, for which the surviving partners alone were liable. As Sir William Grant said, "presumably it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side ... Upon this principle all accounts current are settled, and particularly cash accounts." *Rule in Clayton's case.* Facts of the case. First payment will be appropriated to the earliest debt.

* S. 60 of the Indian Contract Act.

Exception to the above rule.

But if there are special circumstances, *the Rule in Clayton's case* may not apply. Thus *in Re Hallett's estate*,* a solicitor who had dealings with a bank, sent in some trust-money in his own name, and thereafter sent in some money of his own. Afterwards he drew out diverse sums by cheques. It was contended that, according to the *Rule in Clayton's case*, what he had drawn out was the trust-money, which had been first paid. That contention was negatived, on the principle that a man is intended to act rightfully rather than wrongfully, unless we have evidence to the contrary. So it must be presumed that the solicitor drew out his own money, which he had a perfect right to draw, rather than the trust-money, in drawing out which he would be committing a breach of trust.

between trustee and *cestui que trust.*

But the rule applies where all the moneys are trust-moneys.

But if all the monies sent to the bank were trust-moneys, the *Rule in Clayton's case* would have applied.

III. Appropriation of Securities.

Appropriation of securities :—

Where a debtor borrows money from a creditor, and gives securities for the loan, the creditor is in general entitled to deal with the securities, applying the sale-proceeds to his debt, and rendering to the debtor the surplus, if any. Now, if the creditor disposes of those securities, to that extent the loan is discharged.

(1) Where one debt, and

(2) Where successive debts.

Where the debtor borrows from the creditor successive loans, giving successive securities to the latter

* *Knatchbull* v. *Hallett* 13 Ch. D. 696, over-ruling *Pennell* v. *Deffell* 4 De G. M. G. 372.

to provide for the payment of the loans, the debtor is deemed to have appropriated the successive securities to the successive loans, which are therefore successively discharged by the realization of the successive securities respectively appropriated thereto.

Insolvency :—

Where both the debtor and the creditor become bankrupt, the rule applicable is known as *the Rule in ex parte Waring*. In such a double insolvency, the securities which remain *in specie* (*i. e.*, undisposed of) are applied according to their appropriation, that is to say, in payment of the creditor's debt to which a particular security has been appropriated, the residue going to the debtor's estate.

(1) Where both parties become bankrupt.

The Rule in Waring's case is only applicable where both the parties become insolvent.

If the creditor alone becomes insolvent, third parties who have acquired an interest in the securities may proceed first against the insolvent's estate, and after receiving the dividends, may then proceed against the debtor's estate for the residue.

(2) Where creditor alone becomes bankrupt.

If the debtor alone becomes insolvent, the creditor discharges his acceptances in full, and applies the securities as his own property to the extent of his debt, and third parties who have acquired an interest in the securities cannot proceed against the insolvent's estate.

(3) Where debtor alone becomes bankrupt.

CHAPTER IX.

SPECIFIC PERFORMANCE.

Common law remedy for breach of contract was inadequate.

At common law, every contract or covenant to sell or transfer a thing, if there is no actual transfer, is treated as a personal contract or covenant; and as such, if it is unperformed by the party, no redress can be had, except in damages; that is in effect, in all cases, allowing the party the election either to pay damages, or to perform the contract or covenant at his sole pleasure.

Relief in equity.

But courts of equity have deemed such a course wholly inadequate for the purposes of justice; and considering it a violation of moral and equitable duties, they have not hesitated to interpose, and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse.

No specific performance, where damages would give complete relief.

The inadequacy of the common law remedy of damages being thus the foundation of the jurisdiction in equity, a contract for whose breach damages afford a complete remedy will not be specifically enforced.

Contracts which would not be specifically enforced:

Equity will not, however, compel specific performance of the following contracts:—

(1). Illegal or immoral agreement.

(1) *Illegal or immoral agreements.* But a separation agreement will be enforced, where the separation is imminent.

(2) *Agreements without consideration, or revocable will* * But an agreement for a lease from year year will be specifically enforced. (2) Agreement without consideration.

(3) *Contracts which the court cannot enforce*:— (3) Which the court cannot enforce:-

(*a*) *Requiring personal skill or volition.*† (*a*) Requiring personal skill

Illustrations.

(a) A agrees to paint a picture. He makes default. The ntract cannot be specifically enforced.

(b) A, a singer, contracts with B, the manager of a theatre, sing at his theatre for a year, and to abstain from ging at other theatres during that period. She absents herself. ie court may, by an injunction, restrain her from singing at her theatres, but cannot compel her to sing at B's theatre *Lumley* v. *Wagner* 1 De G. M. & G. 604].

(*b*) *Contracts for the sale of the goodwill of a business without the premises, or of agreements requiring e performance of continuous successive acts.* (*b*) For sale of a goodwill without premises.

Illustration.

A and B contract that, in consideration of annual advances be made by A, B will, for three years next after the date of ie contract, grow indigo on his land, and deliver them to A. he contract cannot be specifically enforced.

(c) *Contracts to build and repair.* (c) To build and repair.

Such contracts would not be specifically enforced, s damages would afford an adequate remedy.

* Cl. a. 21 cl. (d) of the Specific Relief Act.

† Cl. a. 21 (b) Ibid.

Exception.—But where the agreement is definite, and the plaintiff would be otherwise without any remedy, specific performance will be decreed.

(4) For loans.

(4) *Contracts for the loan of money, whether by way of mortgage or otherwise,*—because damages would give adequate relief.

(5) Contracts wanting in mutuality, *e.g.*, an infant's contract.

(5) *Contracts wanting in mutuality.* The contract, in order to be specifically enforced, must be mutually binding. Thus, as an infant's contract was voidable at his option, he could ratify it and sue on it. But he could not claim specific performance.

(6) Contract to make a particular appointment.

(6) *Contract by donee of power to make a particular appointment* cannot be specifically enforced, and the only remedy would be damages [see *ante*, Page 71].

A portion of a contract may be specifically enforced, if severable from the rest.

Severable contracts. As regards a contract comprising several matters, if some of them are capable of being specifically enforced and the others are not, specific performance of the former may be obtained, if clearly severable, and a piecemeal performance of the agreement is consistent with the intention of the parties.

Generally speaking, contracts for land will be specifically enforced, while contracts for goods will not.

Land and goods. It may be stated as a general rule in equity, though subject to several important exceptions, that a contract for land will be specifically performed in equity, while a contract for chattels will not.* The reason is, that in the former case the damages at law, calculated upon the general value of land, may not be a complete remedy to the purchaser, to whom the land purchased may have a

* Cf. s. 11 and 12 of the Specific Relief Act.

peculiar value, by reason of vicinage or accommodations. On the other hand, in the latter case, the damages at law, calculated on the market price of the stock or goods, are as complete a remedy for the purchaser, as the delivery of the goods contracted for in as much as with the damages he may ordinarily purchase the same quantity of goods.

Goods. Thus, although a contract with regard to goods may not be specifically enforced, yet where damages would not be an adequate remedy, equity will grant specific relief.* Instances where a contract for moveables will be specifically enforced.

Illustrations.

(*a*) A contracts to sell 800 tons of iron to B, to be paid for in a certain number of years by instalments. B may claim specific performance, because the profits upon the contract, being made to depend on future events, could not be correctly estimated by the jury in damages, in as much as the calculation must proceed upon mere conjecture. Such a contract differs from one which is to be immediately executed.

(*b*) A ship-carpenter contracts for the purchase of a large quantity of timber. The contract is peculiarly convenient to the purchaser, by reason of the vicinage of the timber. The court will decree specific performance.

(*c*) The seller, with a view to clear his land of natural timber, contracts for the sale thereof. The court will decree specific performance.

(*d*) Where the article agreed to be sold is an article of unusual distinction and curiosity, and of doubtful value, e. g., a Greek statue, or an ancient manuscript, or a rare China vase, or

* Cf. s. 11 and 12 of the Specific Relief Act.

a picture by a dead painter, or an heirloom, specific performance will be decreed.*

(*e*) A contract for the sale and purchase of shares in a Railway Company would be specifically enforced, because the shares being limited in number, are not always available at the market, and their possession carries with it the status of a shareholder.†

(*f*) A contract for the sale and purchase of an annuity would be specifically enforced, because it is of uncertain duration, and its exact value is not capable of being determined.

(*g*) A is a debtor to B. B contracts to assign the debt to C. A becomes insolvent before performance. Either B or C may compel specific performance against the other, because the sale is of uncertain dividends to become payable, and damages would not accurately represent their value.

Where there is a fiduciary relation between the parties.

Where there exists a fiduciary relation between the parties—whether it be that of an agent, trustee or broker, the court will compel a specific delivery. ‡

Illustration.

A, proceeding on a voyage, leaves his furniture in charge of B as his agent. B, without A's authority, pledges the furniture with C, and C, knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

Contract for lands.

Lands. Courts will generally decree specific performance of contracts regarding lands. And this rule extends even to lands situate abroad (see page 26), provided the parties are within the jurisdiction, and the suit is against the promisor personally (and not against his assignee).

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* See s. 12, Ill. (b) of the Specific Relief Act.

† See s. 12, Ill. (c), Ibid.

‡ See s. 11 (a), and Ill., Ibid.

Specific Performance: what it means.—The phrase is used in a double sense:— What is meant by specific performance.

(1) In the sense of turning an executory contract into an executed formal contract which is provided for in the executory contract. For instance, specific performance of a contract for sale of lands would mean a decree for execution of a formal conveyance of sale.

(2) In the sense of carrying out *in specie* the subject-matter of the agreement. Thus, where the contract is for the delivery of goods, specific performance is sometimes used in the sense of a compulsory delivery.

The phrase specific performance is more correctly used in the former sense. Specific performance in the latter sense is often procured by means of an injunction.

Where the contract is in writing. By the Statute of Frauds, every contract with respect to land must be in writing,* signed by the party to be charged therewith, and such memorandum would be the only evidence of the contract. The contract may be contained in two or more instruments, which may be connected upon the face of them, or their connexion may be established by parol evidence. Parol evidence may also be admitted to establish the identity of Statute of Frauds:—Contracts with respect to lands must be in writing.

* "No action shall be brought whereby to charge any person..... upon any contract or sale of lands, tenements or hereditaments, or upon any interest in or concerning the same.....unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party or his lawful agent"—29 Car. 2, c. 3, (Statute of Frauds).

the lands. The memorandum need not be made at the time of the contract; it is sufficient if it is made subsequently, before the institution of the suit. In the absence of the memorandum the contract is not void or voidable; it is simply unenforceable. So that no contract for the sale of land would be specifically enforced, subject to the following exceptions :—

Exceptions :—

(1) Where defendant admits the contract in his written defence.

(1) *Where the defendant in his defence admits the agreement* as set forth in the statement of claim, specific poformance would be decreed, inspite of the want of writing. The reason is, the Statute is designed to guard against fraud and perjury; and there can be no danger of that sort when the defendant admits the agreement. Moreover, in such a case, the defendant, by his defence (which is signed by him) supplies the memorandum which, as we have seen, need not be contemporaneous with the contract, but may be subsequent.

But where the defendant admits the agreement, but insists on the Statute as a defence, it is now settled that the defence is good. But if the defendant has waived such a defence, and afterwards retracts such waiver, or when he pleads a wrong section of the Statute as a defence, the plaintiff is entitled to judgment.

(2) Where there has been fraud.

(2) Where the agreement is intended by the parties to be reduced to writing in accordance with the Statute, *but it is prevented from being done by the fraud of one of the parties*. Here equity will decree specific performance, on the ground that the Statute

which has been passed to prevent fraud, cannot be permitted to be used as an engine of fraud.

Illustrations.

(*a*) One agreement in writing is proposed, and another secretly and fraudulently brought in and executed in its place. Equity will grant specific relief.

(*b*) If instructions are given by the intending husband to prepare a settlement, and he promises to have the settlement reduced to writing, but secretly and fraudulently prevents its being done, and the marriage is solemnized, equity will decree specific performance.

(*c*) But if, in the above illustration, there has been no fraud, and no agreement to reduce the settlement to writing, but the other party has relied solely on the honour, affection or word of the husband, no relief will be granted ; for the party chooses to rest upon a parol agreement, and must take the consequences.

(3) *Where there has been part-performance.* Where the parol agreement has been partly carried into execution, equity would compel a specific performance — because, otherwise one party would be able to practise a fraud on the other. Certainly it could never have been the intention of the Statute to enable any party to commit such a fraud with impunity; for, where one party has executed his part of the agreement, in the confidence that the other party would do the same, if the latter should refuse, it would be a fraud on the former to suffer this refusal to work to his prejudice. (3) Where there has been part-performance.

Now, what is to be deemed part-performance so as to take the case out of the Statute ? What is part performance :—

(*a*) Acts merely introductory or preliminary to an agreement are not considered as part-performance Merely ancillary acts are not.

thereof, though they should be attended with expense.

Illustration.

Delivery of an abstract of title, giving directions for conveyance, going to view the estate, fixing an appraiser to value stock, making valuation, measuring the land etc., are not part-performance.

When possession is not part-performance.

(*b*) Mere possession of the land contracted for will not be deemed a part-performance, if it be obtained wrongfully by the vendee, or if it be wholly independent of the contract.

Illustrations.

(*a*) If a vendee enters into possession, not under the contract, but in violation of it as a trespasser, the case is not taken out of the Statute.

(*b*) The vendee is a tenant-in possession under the vendor. Here his possession is not part-performance, because it is properly referable to his antecedent tenancy, and not to the contract.

(*c*) But if, in the case of an existing tenancy, the nature of the holding is made different from the original tenancy, as by the payment of a higher rent or by other unequivocal circumstances, referable solely to his contract, the tenant's possession may take the case out of the statute. This would specially be so, if the tenant has expended money in building or repairs, or other improvements.

(*d*) Similarly, a mere continuance of possession, if it can solely and unequivocally be referable to the contract, will be deemed part-performance. *

* The doctrine of part-performance is not confined to contracts for lands, as held in *Britain* v. *Rossiter* 11 Q. B. D. 123, but applies to all cases in which a court of equity would entertain a suit for specific performance, if the alleged contract had been in writing—*McManus* v. *Cooke* 35 Ch. D. 681. Moreover, it applies

(c) But mere payment of the purchase-money, whether in whole or in part, is not to be deemed part-performance.

Mere payment of purchase-money is not part-formance.

(d) *Marriage as part-performance.* The Statute of Frauds requires that every agreement in consideration of marriage must be made in writing; and it would be sufficient for the purposes of the Statute even if the agreement is put into writing after marriage, in pursuance of the ante-nuptial parol agreement.

Marriage as part-per-formance.

But if the marriage takes place, and there is no written agreement either before or after the marriage, the marriage will not, in itself, be taken to be such a part-performance as to evade the Statute. But in certain cases the fact of marriage, taken in conjunction with other facts and circumstances, may be taken to be a part-performance.

Illustration.

The father of the bride, previous to the marriage, told the bridegroom that he meant to give him a specific leasehold property. There was no writing as required by the Statute. After the marriage the father gave the bridegroom possession of the property, and delivered over the title-deeds to him. Before a conveyance was executed, the leasehold was acquired by a public body. Held, there was part performance, and the bridegroom was alone entitled to the compensation-money.

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only to suits for specific performance, and not to suits for damages; so that, if a contract which is required to be made in writing by the Statute, is not in writing, a party cannot claim *damages* by reason of part-performance.

A third party making a representation in order to bring about a marriage, must make that good.

Representation by third party as to marriage. Where a third party makes a representation as a specific fact (and not as a matter of mere opinion) so as to induce another to enter into a marriage, and on the faith of such representation the marriage takes place; he shall be compelled to make the representation good.

Only the contracting parties are necessary parties to an action.

Parties to action. Where the contract is for the sale of land, only the parties to the contract are to be made plaintiffs or defendants.

Illustrations.

(*a*) If the mortgagor has contracted to sell, the mortgagee is not a necessary party to a suit for specific performance of the contract.

(*b*) Conversely, if the mortgagee has contracted to assign his mortgage and refuses, the mortgagor is not a necessary party to an action for specific performance by the assignee.

(*c*) A sells an estate to B. Afterwards A sells the same estate to C. B's action for specific performance is against A only, and C is not properly made a co-defendant with A.

(*d*) Where an agent has sold in his own name, without disclosing the principal's name, the principal is not a necessary party to a suit for specific performance by the purchaser; for any question that may be subsisting between the principal and the agent *inter se* would not concern the purchaser in such a suit.

(*e*) A agrees to grant a lease to B. Before executing the lease, A mortgages the premises to C. B sues A for specific performance. C is not a necessary party.

Defence to a suit :—

Grounds of defence. (1) *Want of writing,* as

stated above, when the contract is required to be in writing by the Statute of Frauds. (1) Want of writing, as required by the Statute of Frauds.

(2) *Misrepresentation.* The party who has been guilty of misrepresentation cannot ask for specific performance, although the other party may. A misrepresentation which has partially induced the contract will have the same effect. And an agent's misrepresentation is taken to be that of the principal. (2) Misrepresentation.

In the sale of leasehold lands, a misrepresentation by the seller that the lease contains no unusual covenants will be a good defence, if in fact the lease contains restrictive covenants—*e. g.*, a covenant to build and maintain buildings which would fetch rent at least equivalent to double the rent reserved by the lease. So also, misleading conditions of sale are a good ground for refusing specific performance.

(3) *Mistake.* Mistake is a ground of defence, even if it is to be established by parol evidence. (3) Mistake—

If the mistake is *bilateral*, and consequently some particular hardship falls on the purchaser, the purchaser would be relieved from the contract (see p. 38). But if it is *unilateral* only, the party in error would be able to resist specific performance, though in some cases (*e.g.*, where the mistake is wholly attributable to the defendant), the plaintiff may claim damages at law. unilateral and bilateral.

With regard to mistake or parol variation, evidence of it was wholly inadmissible at law, and, as a general rule, is only allowed to be offered in equity by a defendant resisting specific performance, and not

by a plaintiff seeking specific performance. The reason is, if a plaintiff is allowed to seek specific performance of a written contract with parol variations, it is in effect an attempt to enforce a contract partly in writing and partly by parol; and courts of equity deem the writing to be higher proof of the real intention of the parties than any parol proof can generally be, independently of the Statute of Frauds.

when parol variation may be allowed in cases of mistake.

A plaintiff may, however, be allowed specific performance of a contract with parol variations, in the following cases:—

(*a*) Where the parol variation is set up by the defendant, and the plaintiff consents to its performance.

(*b*) Where the parol variation is in favour of the defendant, and the plaintiff offers to perform the agreement with the variation.

(*c*) Where an omission has occurred by fraud. *

Where the defendant sets up a parol variation, the written instrument will be rectified, and specific performance decreed accordingly, in the following cases:—

(a) Where the mistake has occurred, not in the original agreement, but in the reduction of the agree-

* In the case of *Woolam* v. *Hearn* 7 Ves. 211 and in several subsequent cases, it was held that the Court has no jurisdiction to rectify a mistake in a written instrument by parol evidence and to enforce it, in one and the same action; but in a later case, *Olley* v. *Fisher* 34 Ch. D. 367, Mr. Justice North held, that since the Judicature Act the Court has jurisdiction (in any case in which the Statute of Frauds is no bar) in one and the same action to rectify an instrument and to decree its specific performance as so rectified. Cf. s. 26 of the Specific Relief Act.

ment to writing, the Court will enforce the agreement as so varied in accordance with the real intention of the parties.

But where there is a real and actual misunderstanding between the parties, *i. e.*, when they do not agree upon the same thing in the same sense, there is no contract at all, and there would be no specific performance.

(*b*) Where the parol variation adds a term subsequent to the contract, the contract, with such further term added to it, will not be enforced, unless there have been acts of part-performance.

(4). *Misdescription.* Misdescription may be of two kinds:—(*a*) it may be of a substantial character, so as not to fairly admit of compensation, or (*b*) it may admit of compensation. In the former case, the seller cannot compel specific performance.

(4) Misdescription, which is of a substantial character.

Illustrations.

(*a*) Where the contract is for the sale of copyhold, and it turns out to be freehold, the purchaser cannot be compelled to take freehold, because this is something other than what he has contracted for.

(*b*) Where the contract is for the sale of an original lease for 99 years, the purchaser will not be compelled to accept an underlease for that period, because a lease and underlease are essentially different in as much as there is no privity of contract between the head-landlord and the under-tenant.

But where the difference is slight, the purchaser will be compelled to take with compensation, as in the case of a small difference as to area.

But not where the difference is slight.

Illustrations.

(*a*) A contracts to sell 100 acres of land. It turns out that he has title to 98 acres only. Here, the purchaser will be compelled to accept 98 acres, with compensation for the want of 2 acres to be deducted from the price. *

(*b*) But if the plot of 2 acres is essential, as where the purchaser buys the land for the purpose of carrying on his business as a wharfinger, and the 2 acres which form the frontage to the river belongs to another, the purchaser cannot be compelled to accept 98 acres [*Peers* v. *Lambart* 7 Beav. 546].

Misdescription discovered after completion of the conveyance.

If any error or misdescription comes to light after the completion of the conveyance, the purchaser is entitled to compensation, unless there is a condition in the agreement which expressly limits the right of compensation to errors and misdescriptions discovered before the conveyance. Such a covenant will be operative.

Purchaser may accept what he can get,

On the other hand, though a purchaser cannot in all cases be compelled to accept, still he may, if he so chooses, take whatever he can get, with compensation for what he cannot have. If one contracts to sell a free-simple, and has only a term of 100 years, the buyer has a right to that term, if he thinks fit.

unless it is unreasonable or prejudicial to third parties.

But what such partial performance would be unreasonable or prejudicial to third parties interested in the property, the court will refuse specific performance.

Illustrations.

(*a*) Where a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belong-

* See s. 14, Ill. (*a*) of the Specific Relief Act.

ed to the wife, and the wife afterwards refused to convey, *held*, that the purchaser could not compel the husband to convey his interest and accept an abated price [*Castle* v. *Wilkinson* 5 Ch. D. 534].

(*b*) A seller cannot, at the election of the buyer, be deprived of his mansion-house and park to which he could make a good title, while a large adjoining estate held and sold with it would be left on his hands with a proclaimed bad title.

Where the property is materially unfit for the purpose for which it is taken, specific performance will not be granted against the purchaser.

Where property is materially unfit for the purpose for which it is taken.

Illustrations.

(*a*) Where the purchase is of building land, and it turns out that there is a culvert running across the estate which will interfere materially with the development of the estate, specific performance would be refused.

(*b*) Where the purchase is of agricultural land, and there is no right of cartway to it, specific performance will be refused.

(5). *Lapse of time.* At common law, time was of the essence of the contract; but in equity, time may or may not be material, or may or may not admit of compensation for delay.

(5) Lapse of time.

In equity time is not, generally speaking, of the essence of the contract. The following are the exceptions:—

Generally speaking, time is not of the essence of the contract, subject to several exceptions.

(*a*) Time may be material from the nature of the subject-matter of the contract *e g.*, in the sale of a

reversion, or of a leasehold, or of stocks—things which vary with the efflux of time.

(*b*) Time may be material with regard to the express object in view of the parties—*e. g.*, where a house or building is sold for the purpose of residence, or of starting a business [*Hipwell* v. *Knight* 1 Y. & C. Ex. 415]. Thus, where a business is sold as a going concern, it is of the essence of the contract that the purchaser should, on the day agreed upon, be placed in a position so as to be able to enter and lawfully carry on the business.

(*c*) Time, which was not originally of the essence of the contract, may be so, by a reasonable notice of one of the parties.

(*d*) The delay may have been so great as to be evidence of an abandonment of one's right under the contract.

Suits brought after long delay.

As regards suits for specific performance, courts of equity have regard to time so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance, the suit is treated with indulgence and generally with favour by the court. But the circumstances must not have changed in the meantime, and compensation must be given for the delay.

(6) Trickiness.

(6) *Trickiness.* If the agreement is tainted with fraud, misrepresentation or surprise, the court will refuse specific performance.*

* Cl. a. 26 of the Specific Relief Act.

In the case of a sale by a trustee, if there are depreciatory conditions, formerly the contract could not have been specifically enforced; but now it is expressly provided by the Trustee Act, 1893 (56 and 57 Vic. c. 53), that depreciatory conditions would not be a ground for refusing specific performance.

(7) *Great hardship.* The jurisdiction of equity in granting specific performance being discretionary only,* the court may refuse specific performance if it will operate as a great hardship on either of the parties.† But the defence of hardship is not an easy one to sustain, and ordinary hardship would not be sufficient for the purpose.

(7) Great hardship.

This defence is not easy to establish.

(8) *Illegality, or breach of trust.* An agreement which involves an unlawful act, or the breach of a prior agreement, or a breach of trust, will not be specifically enforced.

(8) Illegality or breach of trust.

Illustration.

A contracts to sell his premises to B. Afterwards A contracts to sell the same premises to C. Specific performance of the latter agreement will be refused.

But if the seller represents to the second buyer that the prior contract is an invalid one, the second buyer may take the risk and ask for completion of his contract, and after such completion he would be invested with all the rights of the seller to question the prior contract.

(9) *No contract.* If the alleged contract is no contract at all, that is to say, is incomplete as a contract,

(9) Where the alleged contract is no contract,

* Cf. s. 22, Specific Relief Act. † Cf. s. 22, II, Ibid.

because there has been no offer and acceptance, or no performance of a condition precedent.

either because there was no definite offer and unconditional acceptance, or there was mere negotiation or because some condition precedent has not been fulfilled, the court will not decree specific performance—for that would, in effect, be the making of a contract for the parties But in the case of the non-performance of a condition precedent, the party in whose favour it is, may waive it and ask for specific performance.

Where the terms of the contract are uncertain.

The court will also refuse specific performance where there is any uncertainty* in any essential term in the contract—*e. g.*, in the case of a lease, as regards the subject-matter of the lease, or as regards the parties to the contract, or as regards its duration. But an uncertainty which can be removed by proper enquiries will not be a ground for refusing specific relief.

(10) Defect in title.

(10) *Defect in title.* Where the vendor cannot establish his title, or can, at best, show a doubtful title, or if his title to the property is dependent on his having performed some condition precedent, which he has not done, or his title depends on his showing that he has paid full value, or that he has purchased without notice, there would be no specific performance.

But the purchaser can only ask for such title as is stipulated for in the contract of sale. In the absence of any stipulation he will not be compelled to accept a "good holding title."

* Cf. s. 21 (c) Specific Relief Act.

Restrictive covenants (by which the owner is compelled to use the land only in a particular manner or is prevented from using it in a particular manner) are derogatory to the title, so that, in the absence of any stipulation to the contrary, the purchaser cannot be compelled to accept the estate subject to the restrictive covenants. But the rule is inapplicable to the case of personal chattels, because in this case the restrictive covenants are not binding on the purchaser.

The existence of restrictive covenants is a defect in title.

Liability for Street Improvements. Under the several Street Improvement Acts, the occupier of every house on the street is bound to contribute his proportion of the expenses for improvements effected on the street in accordance with the Act, and such expenses would be a charge on the premises. Such a charge is recoverable, either by a summary proceeding before the justices within 6 months, or else by a regular action, like an ordinary charge. Under an open contract the vendor is bound to pay it, and if the purchaser has been compelled to pay, he may recover it from the vendor.

Street Improvement Acts.

Incidents of specific performance.

(a) Conveyance. When the court has decreed specific performance, if the parties do not agree as to the form of the conveyance, the practice of the court is to settle it.

On a decree for specific performance, court settles the terms of the contract,

(b) Possession. Usually the purchaser cannot obtain possession pending a suit for specific performance, but as equity regards that done what should have been

and delivers possession.

done, the vendor in possession is to some extent a trustee for the purchaser. But pending such a suit, possession may be given upon just and equitable terms If the purchaser has entered into possession before payment of the whole or a part of the purchase-money, the vendor will be entitled to interest on the unpaid consideration. And the rule applies even where the purchaser has not taken possession, provided the vendor is not at fault. But where the vendor is at fault, he will not be allowed interest on the unpaid purchase-money.

Possession may sometimes be given pending the disposal of the action.

(c) Title-deeds. On payment of the purchase-money, the purchaser is entitled to obtain the title-deeds. But where the sale is in lots, the purchaser of the most valuable lot is entitled to the title-deeds, the others getting, at best, attested copies thereof with an acknowledgment of their right to production. *

Title-deeds go to the purchaser.

Repudiation. The purchaser may repudiate the contract for any just cause, and in general, on any of the grounds abovementioned on which he can resist a suit for specific performance. In the case of a valid repudiation, he will be entitled to a return of his deposit.

When the purchaser may repudiate.

But if he repudiates without sufficient cause, he will forfeit the deposit and will be compelled to pay compensation.

The vendor usually reserves the right to rescind the contract in case the purchaser takes any objection or makes any requisition which the vendor is either un-

* Cf. s. 48 (3) of the Transfer of Property Act.

able or unwilling to comply with. Now, if the vendor has some title, and is acting honestly, he can exercise this option, and in such a case, he is bound to return the deposit.

Upon discovery of a defect of title, the purchaser's obvious remedy is rescission of the contract, and not compensation, though he sometimes may have specific performance with compensation, and *a fortiori*, a proportionate abatement of the purchase-money.

Vendors' and Purchasers' Act, 1894, provides a summary procedure of specific performance.

Vendors' and Purchasers' Act, 1894. This Act provides a ready means of specifically enforcing contracts for the sale of lands. A summons may be obtained by either the vendor or the purchaser by applying in the Chancery Division on such a contract. Under this Act, where there is no dispute as to the initial validity of the contract, the parties may have many questions decided which could otherwise be decided only in an action for specific performance. But the court cannot, on such a summons, award damages property so called, for which a regular action must be instituted.

CHAPTER XII.

INJUNCTIONS.

Injunction defined.

Definition. A writ of injunction is a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing. The object of this process was generally preventive, rather than restorative; that is to say, it prevented a party from doing a wrongful act, rather than ordering him to repair a mischief which he has already done. But in exceptional cases it may be restorative or *mandatory*, as where the wrongful act has been done in a hurry, in anticipation of an injunction, and after due warning. *

Injunctions are either interlocutory, or perpetual.

Injunction may also be either *interlocutory* or *perpetual*. *Interlocutory* injunctions are such as to continue until the hearing of the case upon the merits, or generally until further orders. *Perpetual* injunctions are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually restrained from asserting a right, or doing a particular act. The object of the former is to maintain the property *in statu quo* until the hearing. The latter is, in effect, a decree, and concludes a right. †

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* See s. 55 of the Specific Relief Act.

† Called *temporary* and *perpetual* injunctions in the Specific Relief Act. See s. 53.

Prior to the Judicature Act, there were two classes of injunctions:—

I. Injunctions to prevent the institution or continuance of judicial proceedings in other courts.

II. Injunctions to restrain wrongful acts *in pais*, that is to say, unconnected with judicial proceedings.

I. INJUNCTIONS TO RESTRAIN JUDICIAL PROCEEDINGS *(now obsolete)*. Injunctions to restrain judicial proceedings.

Where a suit was wrongfully instituted in any Court, *e. g.*, on a bond which was void as being opposed to public policy, the defendant could, by an injunction from the Court of Chancery, restrain the plaintiff from prosecuting the suit. *

Now, under the Judicature Act, 1873, s. 24, the power of the court of equity to restrain proceedings actually pending in any court is abolished; and every matter of equity, which would formerly have been a ground for an injunction, may now be pleaded as a defence to the action, whereupon the court before which the action is pending may direct a stay of the proceedings. They are now obsolete.

It must be noticed that this injunction was not a direct interference with a judicial proceeding pending in any other court, i. e., not a direction to such court to stay proceedings, but was in the nature of a personal command on the plaintiff to abstain from prosecuting the action, to be enforced by his committal

* Cf. s. 56 (a) of the Specific Relief Act.

for contempt or otherwise in case of his disobedience. Here equity acted *in personam*.

Where formerly granted :—

Though this injunction is now obsolete, it is convenient to indicate the cases in which equity formerly granted an injunction to stay legal proceedings. These are the following :—

Voidable instrument.

(1) Where a suit was instituted on an instrument obtained by fraud or undue influence.

Loss of assets to an estate.

(2) Where assets have been lost to the estate without the executor's default, equity restrained the creditors from proceeding at law against him.

Illustration.

An executor had in his hands funds sufficient to pay off all the creditors in full. By an accident a substantial portion of the funds was destroyed, so that the estate became insolvent The creditors sued in law for recovery of their debts. Equity restrained them from prosecuting their claims, and the remedy of the creditors was to institute an administration-suit in equity.

Similarly where on the administration-suit of a creditor an administrator was appointed, and a bond creditor thereafter sued at law, equity restrained him from continuing the suit. *

Where plaintiff has legal title, but defendant has equitable title.

(3) Where the plaintiff had some legal title, and the defendant an equitable title, the defendant could, in equity, obtain an injunction against the plaintiff.

Illustration.

Some moveable property was bequeathed to a married woman for her separate use, without the intervention of trustees. Of

* Cf. s. 54, Ill. (g) of the Specific Relief Act.

course, in law, the husband acquired an interest in the property. Now a creditor of the husband, in execution of a decree against him, proceeded against such property. The creditor was restrained by an injunction.

(4) Where there is a subsisting agreement to refer to arbitration, an order of injunction was formerly made, or an order staying execution may now be made. * Agreement to refer to arbitration.

(5) Where more than one suit is brought for the same purpose. † To prevent multiplicity of suits.

Equity would not interfere to stay proceedings in the following cases :— Where equity would not interfere :—

(1) In criminal matters ‡, or in a libel action, unless the party prosecuting the criminal proceedings was also the plaintiff in equity, in which case equity restrained him. criminal matters or libel actions.

Also, where a petition has been presented for the winding-up of a Company, all criminal proceedings against the Company were restained by an injunction.

(2) Equity had no jurisdiction to relieve a person from a judgment at law, when the case in equity rested upon a ground equally available at law; and by the Common Law Procedure Act, 1854, all equitable defences could be pleaded at law. Where the defence was available at law.

Exception. The equitable defence, in order to be valid at law, must be a complete defence, so that when

* See s. 28, Exception (1), Indian Contract Act.

† See s. 52, (*a*) of the Specific Relief Act.

‡ S. 7 and s. 56 (*c*) Ibid.

a person had an incomplete equitable defence, he was compelled to come to equity, and equity granted him an injunction in a proper case.

Injunctions to restrain wrongful acts *in pais*:—

II. INJUNCTIONS AGAINST WRONGFUL ACTS *in pais*

(*i. e., unconnected with judicial proceedings*).

These are against I. *Breaches of contract*, and II. *Torta*.

I, Breach of contract.

I. Breaches of Contract. (1) This jurisdiction of equity in issuing injunctions is supplemental to that of specific performance; and therefore if the contract is not specifically enforceable, the court will not, by injunction, restrain the breach of it. *

No injunction, where specific performance would be refused.

But there are exceptions to this general rule.

Illustration.

(*a*) A, a brewer, sold a piece of land to B for the erection of a public-house thereon, B covenanting that A shall have the exclusive right of supplying beer to any public-house built thereon. C, another brewer, purchased a portion of the land from B, he having notice of the covenant. C built a public-house thereon, which he began to supply with his own beer. At A's suit the court granted an injunction against C, forbidding him to use his own beer, in as much as the covenant, though in terms positive, was in substance negative. It will be noticed that the court would not have enforced specific performance of the covenant. [*Catt v. Tourle* 4 Ch. App. 654].†

* See s. 56 (*f*) of the Specific Relief Act.

† *Cf.* s. 57 (*c*) of the Specific Relief Act.

A purchaser who, before completion of his purchase, has notice of restrictive covenants, will be compelled to observe them. Restrictive covenants may be discharged, e. g., by an alteration in the character of the neighbourhood. Restrictive covenants.

(2) *Negative Agreements.* Injunction is the natural mode of specifically enforcing a negative agreement. Negative agreements —injunction is the proper mode of enforcing them

Illustrations.

(*a*) *Martin* v. *Nutkin* 2 P. Will. 266. A bell in the parish-church, which was being rung every morning, was very disagreeable to the plaintiffs. The parish then covenanted with the plaintiffs, not to ring the bell, in consideration of the plaintiffs having, at their own expense, erected a new cupola, clock and bell to the parish-church. The parish continued to ring the old bell. An injunction was granted.

(*b*) *Lumley* v. *Wagner* 1 De G. M. & G. 616. A singer contracted with the manager of a theatre to sing at his theatre for a certain period, and at no other. She absented herself. The court observed, that to the affirmative agreement there was superadded a negative stipulation ; and though the court could not compel her to specifically perform the affirmative agreement, yet may, by injunction, compel her to abstain from a breach of the negative agreement.

Exception. The court will not grant an injunction in the case of a negative agreement, when the court cannot secure performance by plaintiff, as or instance where the terms of the contract are such that the court cannot superintend its performance.

(3) An injunction may be granted in a proper

case, even if the negative covenant is not apparent, but is to be implied.

Statutory contracts.

(4). *Statutory Contracts.* The court will also interpose by an injunction to prevent a breach of a statutory contract. Thus, a Railway Company which is exceeding or threatening to exceed its legal powers, or is using its powers vexatiously or oppressively, may be restrained by an injunction. In such a case, if the suit is by the Attorney-General, or by a share-holder of the Company which is the defendant in such an action, no actual damage need not proved; proof of a tendency to produce serious public mischief, or plain proof of the illegality, is sufficient.

II. Tort.

II. **Injunctions to prevent a tort** *i. e.*, wrongs independent of contract. As a general rule, wherever a right cognizable at law exists, a violation of that right will be prohibited by an injunction, unless where considerations of expediency or convenience arise.

Waste, when relievable.

(1) *Waste.* Equity will interfere in cases of waste—

(*a*) Where the title of the parties is purely equitable.

(*b*) Where the waste is only apprehended.

(c) *Waste by a tenant in possession.* Equity will interfere at the suit of either the reversioner or remainderman.

(d) *Equitable waste.* A tenant for life would not be liable for ordinary waste, if he is a tenant "without impeachment of waste." But in such a case, if the waste is malicious, extravagant or capricious, equity

will interfere—*e. g.*, when the tenant pulls down or fells ornamental timber. Such a waste is called "equitable waste." A 'tenant-in-tail without possibility of issue extinct' is in the same position as a tenant for life without impeachment of waste and would be liable for equitable waste.

(*c*) *Waste by mortgagor.* If the mortgagor in possession commit waste, such as felling down of timber, *and the security becomes insufficient thereby*, he will be restrained. [But a mortgagor in possession, being the owner in equity, may commit waste, provided the security does not become insufficient.*]

Waste, when not relievable in equity :— When not.

(*a*) *Permissive waste* by a tenant for life.—Negative or permissive waste (*i. e*, for want of necessary repairs) would not be prevented by an injunction.

(*b*) *Ameliorative waste*, by which the property becomes more valuable, *e. g.*, by the conversion of warehouse property into residential property, and thus fetching higher rent, would not be prevented by an injunction.

(2) *Nuisances.* Nuisances.

(*a*) *Public nuisance.* A public nuisance is a criminal offence, but a civil information also lies in equity against a public nuisance.† This civil information may be— Public nuisance.

(*i*) at the suit of the Attorney-General, or

* Cl. a. 66 of the Transfer of Property Act.

† See s. 91 of Act V of 1908 (Civil Procedure Code).

(*ii*) at the suit of a private person, who has suffered some special injury over and above all other persons affected by the nuisance. Here the Attorney-General is not a necessary party. A public body suing in respect of a public nuisance is like an ordinary individual (*i. e.*, must show special damage).

When nuisance is not relievable.

Nuisance, when not relievable in equity :—

(*a*) At the suit of a private person who has not suffered any special damage.

(*ii*) Where the nuisance is legalised by statute. But the legalising statute must be strictly construed *e. g.*, if it has authorised a nuisance in the first instance, it will not be read as authorising the continuance of the nuisance. When a nuisance has been legalized, any excess of it may be a nuisance.

Private nuisance

(*b*) *Private nuisance.* For private nuisance, there may be a peaceful abatement or removal by the party aggrieved (but not attended with a breach of the peace), or an action of damages at law, or an injunction in equity.

When the nuisance is of a slight nature, or is capable of being compensated in money, or consists in a fanciful diminution of the value of property, injunction will not be granted *e. g*, in the case of an ordinary trespass to property, done without any claim or right. But when the trespass is done under colour of right, and nothing to justify that claim, an injunction may be granted even in the case of an ordinary trespass.

But where the injury is serious and irreparable, *e. g.*, when it tends to the loss of health or trade, or to the permanent ruin of property, or is continuous, equity will grant an injunction. Thus equity will relieve in— when it is serious and irreparable—

(*i*) *Darkening ancient lights* which a person is in enjoyment of, either by contract, or by prescription. *e. g.* darkening ancient lights,

In order to sustain an action on an injunction, it must be shown that there is a substantial diminution of light, so as to interfere with the ordinary user of the premises.

(*ii*) *Obstruction of air.* Similar is the rule. or obstructing air,

(*iii*) *Disturbance of the right to lateral support.* An owner has the right to the lateral support of his neighbour's land, to sustain his own soil in its natural state. or disturbing right to lateral support,

(*iv*) *Flooding of lands.* An owner will be protected against a flooding of his own lands by his neighbour. or flooding of lands,

(*v*) *Polluting streams.* A riparian owner has a right to restrain by an injunction, any person polluting the stream, where there is actual damage, or where the continuance of the pollution may grow into a right to foul the stream. or polluting streams.

Where the property from which the nuisance proceeds is a leasehold estate, the reversioner (landlord) is liable equally with the tenant in possession.

Local bodies. **Local Boards.** If any injury is done to a person by a local body under the powers of the Public Health Act, 1875, the injured person may, by first giving notice to the defendant board, obtain compensation from them under section 308 of that Act; but if the injury is not a matter of compensation under section 308, but is a nuisance, the plaintiff may have an injunction against the board.

Similar rules apply in cases of detriment to ancient lights caused under the provisions of the Artisans' Dwelling Improvement Acts.

In the case of local authorities generally, they will be liable for a positive wrongful act, but not for the omission of a statutory duty, unless the statute creating the duty provides a remedy for the omission thereof.

Libels, standers, etc. (3) *Libels, slanders, etc.* Equity will restrain by an injunction the utterance or repetition of libels, slanders, injurious trade-circulars and the like; and the court will even go the length of granting a mandatory injunction to remove the libellous notice.

False and libellous statements at parliamentary elections, including the repetition thereof, may be restrained by an injunction.

Under the Patents, Designs and Trade Marks Act, 1883, any person alleging himself to be a patentee who by circular or otherwise threatens any other person *e. g.*, for an infringement of such patent, must forthwith commence and duly prosecute an action for

an alleged infringement; otherwise the threatened party may have an injunction against the continuance of the threat.

As regards a trade-conspiracy, *e. g.*, "boycotting", or "watching and besetting," the court will interfere by an injunction, only when the damage done would be irreparable.

When a member is expelled from a club, the court will grant an injunction against such expulsion, if the member has been denied the ordinary right of being heard in his own defence; but the court will not interfere when the club is a trade-union, or a proprietary club.

Injunctions are enforced, by committal for contempt or otherwise, not only against the parties enjoined, but also against persons knowingly abetting them in their disobedience to the injunction.

(4) *Patents, copyrights and trade-marks.* Equity exercises jurisdiction in these cases is order to prevent a multiplicity of suits and vexatious litigation.

A. Patents. A patent is a grant from the Crown, by Letters Patent, of the exclusive privilege of making, using and exercising some new invention. Patent.

If the patent is a new one, the court will generally require the validity of the patent to be first established before an *ad interim* injunction will be granted; but if it had been granted some length of time before, which creates a fair presumption of his exclusive title, the court ordinarily grants an injunc- *Ad interim* injunction. When granted.

tion at once. Three courses are open to the court on a motion for an interlocutory injunction:—

(*i*) Injunction simply, when the patent is a rather old one;

(*ii*) When it is a new one, the court would usually adjudicate upon the validity of the patent, and until such decision, grant an *ad interim* injunction, plaintiff giving an undertaking as to damages, except when the plaintiff is the Crown, or the Attorney-General; or

(*iii*) Instead of granting an *ad interim* injunction, the court may direct the defendant to keep an account.

The usual objections to the validity of a patent are:—want of novelty, want of utility and insufficiency of specification.

The court will not grant an injunction unless it is satisfied that (1) the patent is valid, and (2) it has been infringed.*

Copyright.

B. Copyright. Copyright is the exclusive right of multiplying copies of an original work of composition.

Plaintiff must make out his title,

(1) The plaintiff must make out his title to the copyright by registration and otherwise. There may be copyright not only in books, but also in music, engraving, sculpture, maps, painting, photography, and generally in all useful and ornamental designs, and even in unpublished works.

* Cf. s. 54, III (4) of the Specific Relief Act.

There can be no copyright in any work of an irreligious, immoral, libellous or obscene character, * for a court of equity would withhold its aid from a person who, on his own showing, has no title to protection; and to assert a title in things which the law will not upon motives of the highest concern, permit to be deemed capable of founding a just title to property.

(2) It must be shown that there has been an infringement of the copyright. and the alleged infringement.

It is clearly settled not to be an infringement to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it, or to make a *bonâ fide* user of the same common materials in the composition of another work. But the question as to what constitutes a *bonâ fide* user, is a very nice one. The true question is, whether there has been a legitimate use of the copyright publication, in the fair exercise of a mental operation, deserving the character of an original work. It is a very difficult matter to ascertain whether a particular work is original or not. It is obvious that there can be no monopoly of thoughts, or of the expression of them. Language is common to all, and most literary works must contain something that is new, with such that is old and well-known. In some works, the original portion may be small; but if the work is not an exclusive and evasive use of materials already collected by the skill, industry and expenditure of another, it would not be an infringement of the copyright. What is an infringement.

* Cf. s. 54, Ill. (v) of the Specific Relief Act.

Copyright in maps &c.

(*i*) *Copyright in maps, calendars and chronological tables etc.* In these, the materials being equally open to all, the results of independent enquiries must have a certain degree of identity, and therefore it is difficult to detect an unfair use of a prior copyright. Therefore the fact whether one map is a copy of the other is generally to be ascertained by the appearance in the subsequent one of the same mistakes as appearing in the prior one.

Infringement how detected.

Cop. in lectures,

(*ii*) *Copyright in lectures.* In the case of oral lectures, persons admitted as pupils or otherwise to hear them cannot publish them for profit, for the copyright remains in the lecturer.

in title &c.,

(*iii*) *Copyright in title etc.* There is no copyright in the title of a book or newspaper, although there may be in its mere external appearance.

in headings &c.,

(*iv*) *Copyright in illustrations, headings etc.* There may also be copyright in the "Illustrations" published by tradesmen in the catalogues, and in the "Headings" in a trade-directory.

in letters.

(*v*) *Copyright in unpublished letters, literary or otherwise.* The writer has a qualified property in them, so that he may restrain their publication, and the person written to may restrain their publication by a stranger. Publication may, however, be permitted on grounds of public policy.

and in unpublished manuscripts.

(*vi*) *Copyright in unpublished manuscript.* An injunction may be granted to restrain the publication of an unpublished manuscript.

Successive editions of a piratical work. If the person having the copyright does not at once commence an action against the publisher of a piratical work, he may afterwards take exception to a second or subsequent edition thereof, for such edition shows greater marks of piracy.

[*Patent and copyright compared.* Copyright is in the description and not in the thing described, whereas patent is in the thing described.] Patent and copyright compared.

C. Trade-mark. A trade-mark has been defined as the symbol by which a man causes his goods or wares to be identified and sold in the market. Trade-mark.

Before the Trade Mark Registration Acts, 1875-1876, the court interfered in cases of infringement of trade marks on the principle that it is inequitable to allow a fraud to be perpetrated on the public, because a trade mark is merely the right of preventing others from selling similar goods (marked with that trade-mark) merely to mislead the public. Now, by the above Acts, an owner who has duly registered his trade-mark has a property in the trade-mark, and may restrain even an innocent user thereof by an injunction. Trade-mark Registration Acts.

Fancy-words. As regards the registration of fancy-words as trade-marks, it is provided by the Patent Designs and Trade-marks Acts, 1888, that any fancy word may be registered as a trade-mark, provided it is an invented word, *i. e.*, a word having no reference to the character or quality of the goods, and not being a geographical name. A fancy-word may be a trade-mark, provided it is an invented word.

Lord Cairns's Act now repealed.

Lord Cairns's Act (21 *and* 22 *vic. c* 27). By this Act it is provided that in all cases in which a court of equity has jurisdiction to grant specific relief or injunction, the court may in its discretion, award damages, either in addition to, or in substitution for the other relief. It will be noticed that there is no relief in equity, where the bill is filed for damages only; but the Act applies only where the damages are incidental to the injunction. Although Lord Cairns's Act has now been superseded by the Judicature Acts, still the principles of that Act are even now in full force.

Court may grant damages in a suit for injunction.

CHAPTER XIII.

PARTITION.

Remedy at law in partition-matters was inadequate.

At common law formerly coparceners (*i. e.* those who have jointly inherited property from a common ancestor) were allowed to effect a partition; and latterly this right was extended to joint-tenants and tenants-in-common. But the common law remedy of partition was found to be inadequate and incomplete, because the courts of law were incapable of effectuating a partition by directing mutual conveyances; and thus courts of equity began to assume concurrent jurisdiction with courts of law in partition actions. Moreover, common law could not direct a partition where the title of the parties was purely equitable. In the reign of William IV, the jurisdiction of courts of law in partition was abolished altogether.

Relief in equity.

Who can claim partition. A partition action may be maintained by a freehold tenant in possession whether he is a tenant in fee-simple, or in fee tail, or for life, and even when he has a leasehold for a term of years. But a reversioner or remainderman cannot maintain a partition-action, because he cannot disturb the existing order of things during the continuance of a tenant's possession. Also, a person claiming under a disputed title cannot maintain a partition action.

A freehold tenant in possession, and even a lessee for years, may claim partition, but not a reversioner or remainder-man.

Partible property. All freehold corporeal estates, advowsons, rent-charges, leaseholds for years and even copyhold estates are partible property.

What property is divisible.

Disability of a coparcener. If a co-sharer is an infant or a lunatic, the court will carry into effect a decree for partition by making an order vesting their shares in proper persons appointed for the purpose, and if necessary, by directing conveyances to be executed by such persons.

Disability of a partner is now no bar to partition.

Sale in lieu of partition. In some cases, by reason of the property being small, or of the number of co-sharers being large, a partition may be very difficult and inconvenient, and a sale of the property and a proportionate distribution of the sale-proceeds may be beneficial; but equity had formerly no power to direct a sale instead of a partition. Now, however, by the Partition Act, 1868, it is provided that—

Court may now direct a sale of the property instead of a partition.

(1) The court has power, in its discretion, on the request of any co-sharer, to direct a sale instead of a

partition, unless the other co-sharers undertake to purchase the share of the party requesting the sale.

(2) The court is bound, on the request of parties interested in at least a moiety of the property, to direct a sale, unless the other co-sharers show good reason to the contrary.

(3) The court has power to direct a sale where, by reason of the nature of the property, or of the number of co-tenants, the court is of opinion that a sale would be more beneficial than a partition.

CHAPTER XIV.

INTERPLEADER.

'Interpleader' defined.

Definition. An interpleader is a proceeding by which a person from whom two or more persons claim, adversely to one another, the same property, wherein he himself claims no interest other than for charges or costs, and is ready to deliver the property to the rightful owner, may compel such claimants to *interplead* (*i. e.*, to contest the matter among themselves) and may obtain indemnity for himself. *

Although interpleader formerly existed at law, it had a very narrow scope, applying only in the case of joint-bailments. The jurisdiction of equity, on the other hand, in interpleader actions, was much more extended and varied.

* Cf. S. 88 of the Civil Procedure Code (Act V of 1908.)

No interpleader. (1) An agent cannot compel his principal to interplead against a stranger. * An agent or a tenant cannot have interpleader.

(2) A tenant cannot have interpleader against his landlord, except as against third persons who derive their title from the landlord. *

(3) Formerly a sheriff, who had taken property in execution, could not claim interpleader against persons who put forward conflicting claims to the property seized; but now an interpleader action is allowed to a sheriff.

Now, by O. 57, R. 2, of the Judicature Act, it is provided that the plaintiff in an interpleader action must satisfy the court † that— Essential conditions in an interpleader action.

(1) His interest is that of a mere stakeholder;

(2) There is no collusion between him and any of the defendants; and

(3) He is willing to place the property in the custody of the court.

* Cf. O. 35, R. 6 of the Civil Procedure Code Act (V of 1908).

† Cf. O. 35, R. 1 and 2 of the Civil Procedure Code (V of 1908).

THE ORIGINALLY EXCLUSIVE JURISDICTION.

CHAPTER XV.

ORIGIN AND HISTORY OF TRUSTS.

How uses arose.

Origin of trusts. By the ancient common law, all that was necessary to convey lands to a person was by feoffment, acompanied by livery of seisin (delivery of possession as of freehold).

But a conveyance of lands to religious or charitable houses or corporations, was distasteful to the barons, who were the landlords; because as a charitable house or corporation never dies, the landlord lost the customary fees which he received from the heir of a deceased tenant. Therefore the barons, who were then all-powerful in the legislature, passed the Statute of Mortmain (*in mortuâ manu*=into dead-hands) by which a conveyance of lands to a religious or charitable house was declared illegal.

Statute of Mortmain.

Uses were invented to defeat the statute.

In consequence of this statute, the bishops, when they wanted to have a conveyance of lands to a religious house, resorted to the contrivance of taking the conveyance in the name of a third person *to the use of* the religious house (that is to say, the benefit of the conveyance was to go to the house).

Nature of a use.

In such a case, the common law recognized the ostensible transferee only as the owner, and as

owner, he could use the property conveyed to him in any manner he liked, and if he so chose, to the detriment of the purpose for which the lands were conveyed to him: the house, for whose benefit the lands were transferred, had absolutely no remedy at law.

It came to be regarded as a moral obligation, and recognized by the Chancellor.

But it was conceived that the transferee lay under a moral obligation to use the lands in a manner beneficial to the religious house; and the Chancellor, who was fast rising into importance as a regular court of extensive jurisdiction, began to recognize such obligation. The Chancellor was usually an eminent Churchman, and began to enforce this confidence on behalf of the religious or charitable house, by injunctions and penalties.

A use was an *equitable* estate.

From the time when the confidence began to be enforced by the Chancellor, the religious house came to have an interest in the lands; for it had a right to compel the legal owner, through the Chancellor, to pay over to it the rents and profits thereof. This interest was called an *equitable* estate (recognized by the equity courts) as opposed to the *legal* estate of the transferee (recognized by the common law courts.)

Uses and abuses of this equitable estate.

Thus, though uses originated with the religious and charitable houses, still owing to their manifest advantages, they began to extend to other transfers as well; for, by means of a use, a man could enjoy the benefits of ownership, while evading its obligations. Thus the equitable owner, while safe in the protection

of the Chancellor against a possible breach of faith by the legal owner, was not liable to make the customary presents to the landlord; he could sometimes defeat his creditors, as the legal title to the lands being vested in a third person, the lands could not be seized in execution; and the equitable owner could safely commit treason because the lands could not be forfeited to the Crown. Thus in the troubled times of the Wars of the Roses, most of the barons transferred their estates to third persons to the use of themselves, to prevent their forfeiture by the opposite party in case the latter proved victorious. As Bacon tersely puts it, "Uses arose from fear in times of force" (*i. e.*, to defeat the Crown's right of forfeiture) "and from fraud in times of peace" (*i. e.*, to defeat creditors).

The Statute of uses was designed to destroy this equitable estate.

Thus the abuses of the system of uses became so numerous that the legislature had to interfere, and with the object of abolishing this system of double ownership, passed the "Statute of Uses". This statute provided that the legal ownership shall be joined to the equitable ownership; that is to say, the estate of the legal owner would be annihilated, and the equitable owner would be considered the legal owner. It was conceived, that by this method, double ownership being annihilated, the equitable owner would himself be liable for the legal incidents, including forfeiture, payment of debts, and obligations to the landlord.

It made the equitable owner the legal owner as well.

Illustration.

A conveyed lands to B to the use of C. C became the legal owner as well as the equitable owner, and B had no interest whatsoever.

But the popular opinion in favour of uses was so strong that the effect of the statute was directly the reverse of its purpose. For, by a series of legal fictions, courts began to defeat its provisions. Thus the statute was held inapplicable to the following cases:—

The Statute was a failure.

Cases where the statute did not apply:—

(*a*) The statute applied only when "one person stood *seised* to the use of another." Now, as *seisin* was, in the technical language of the English Property Law, applicable only to freehold estates (because a *seisin* means possession *as of freehold*), the statute was construed as being inapplicable to leasehold and copyhold estates.

(a) in the case of leasehold or copyhold estates.

Illustration.

A conveys lands to B for 99 years to the use of C. The statute does not apply, and B continues to be the legal owner, and C the equitable owner.

(*b*) Even as regards freehold estates, the statute was interpreted to mean that the legal owner became a mere conduit-pipe through which the legal estate passed to the equitable owner. Therefore the statute was held to be limited to the case where a mere *passive* duty was reposed in the legal owner, but not where an *active* duty was so reposed in him.

(b) Where an active duty was placed on the legal owner.

Illustrations.

(*a*) A conveys lands to B, with a direction that he should *allow* C to receive the rents and profits. The statute applies, and C becomes the legal owner.

(*b*) A conveys lands to B, with a direction that B should collect the rents and *pay* them over to C, or that B should *sell* the property and make over the sale-proceeds to C. The statute does not apply, and B continues to be the legal owner, and C the equitable owner.

(c) where there was a use upon a use.

(c) Also, as regards freehold estates, the statute did not apply where there was a "use upon a use"—the reason being, that when once a use is executed the statute exhausts itself, and is powerless to carry the use any further

Illustration.

A conveys lands to B to the use of C to the use of D. B's (legal) estate is abolished by the statute, and C becomes the legal owner to the use of D. C's estate cannot be annihilated by the statute.

Now in the three classes of cases specified above, the statute is powerless, and therefore the equitable estate survived in spite of the statute. Such uses came to be known as trusts, as distinguished from the older uses annihilated by the Statute of Uses.

The uses, which survived the statute of uses, were called trusts.

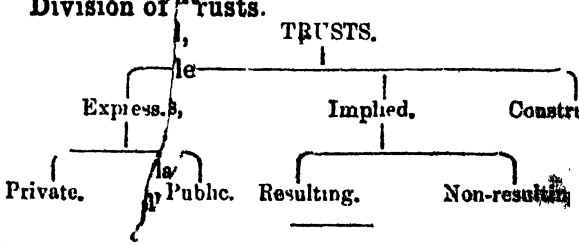
Historically, therefore, a trust is an equitable ownership of property, unattended with the legal ownership, which the Statute of Uses failed to annihilate.

Trust defined.

Or, as defined by sec. 3 of the Indian Trusts Act, "a trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner".

Division of Trusts.

Trusts classified.



CHAPTER XVI.

EXPRESS PRIVATE TRUSTS.

Definition. An express private trust is a trust expressed by the author thereof. Express private trust defined.

Such trusts may be considered from five different standpoints:—

I. Executed and executory.
II. Voluntary, and for value.
III. Fraudulent, and *bonâ fide*.
IV. In favour of creditors.
V. Equitable assignments.

I. EXECUTED AND EXECUTORY TRUSTS.

A trust is said to be *executed* when no act is necessary to be done to constitute it, the trust being finally declared by the deed creating it. It is said to be *executory* when there is a mere *direction* to convey upon a trust, by the use of general expressions. Thus a trust expressed in marriage-articles is an executory trust, for by marriage-articles the parties merely agree to create certain trusts by a future marriage-settlement. Executed and executory trusts distinguished.

Construction. In the case of executed trusts, equity follows the law in the construction of technical words In executed trusts, legal rules of construction apply.

Illustration.

A conveys an estate to B in trust for C for life with remainder in trust for C's heirs of the body. Here, according to the (legal) *Rule in Shelly's Case*, C has an equitable estate in tail.

But executory trusts are construed according to intention; in default, according to the law.

But in the case of executory trusts, equity may or may not follow the law, according to different circumstances. Thus, if the true intention of the grantor may be clearly gathered, or may be implied from the nature of the transaction, equity will construe in accordance with such intention, express or presumed; but in the absence of any such contrary intention, equity will construe the instrument in accordance with its strict legal import. These rules are illustrated in the cases of marriage-articles and wills,—the only cases in which there are executory trusts.

In marriage-articles, the intention to provide for the issue is presumed.

(*a*). *Marriage-articles.* In such an instrument the presumed intention is to provide for the issue of the intended marriage, and the instrument will be construed accordingly.

Illustration.

A, in consideration of his intended marriage with B, by his marriage-articles, agrees to settle an estate on trustees, in trust for himself for life, then remainder to B for life, with remainder to A's heirs of the body by such marriage. Here, according to the *Rule in Shelley's Case*, A might have taken an estate tail, and might have barred the entail, thereby defeating the presumed intention of providing for the issue of the marriage. Therefore A takes a (equitable) estate for life only, and then B also takes an estate for life, and thereafter A's eldest son takes an estate tail [*Trevor* v *Trevor* P. Will. 622].

In wills there is no such presumed intention.

(*b*) *Wills.* In wills there is no such presumed intention, and therefore the intention of the testator, if it can be gathered, is the key to its construction, otherwise it is construed in accordance with the law.

Illustrations.

(*a*). *Strict construction.* A, by his will, gave a sum of money to trustees for the purchase of lands, and directed the lands to be settled to the only use of the daughter and her children. *Held*, by Lord Cowper, that the word 'children' being equivalent to the technical phrase 'heirs of the body', the daughter took an estate tail according to the *Rule in Shelly's Case* [*Sweetapple* v. *Bindon* 2 Vern. 536].

(*b*). *Expressed intention.* A conveyed a sum of money to trustees to be laid out in the purchase of lands, *to be settled* on B for life, and the remainder on B's heirs of the body, *B not having the power to bar entail. Held*, B took an estate for life only, and his children took an estate tail [*Papillon* v. *Voice* 2 P. Will. 471].

II. VOLUNTARY AND FOR VALUE.

A voluntary trust is one in which is there no valuable consideration, which is either money, or what is reducible to a money-value, or marriage. What is a voluntary trust.

Now, with respect to voluntary trusts, the following rules are applicable: —

(a) A promise without consideration is not binding *(ex nudo pacto non oritur actio)*, and therefore a promise to create a trust is not binding on the promisor or his assignee. Promise without consideration not binding.

Illustration.

A promised to convey certain properties in trust for his daughter. He omitted to do so, and by his will conveyed the same properties to his wife. *Held*, the promise was not binding, as it was not based on valuable consideration.

(b) But a voluntary conveyance, if perfect, is binding. But, on the other hand, if it is imperfect, it is in effect a mere promise to convey, and as a promise with- Voluntary conveyance is binding if perfect,

out consideration is not binding, a voluntary trust, if imperfect, would be ineffectual. So that a conveyance for value is binding, whether it is perfect or not, but a voluntary conveyance is not binding, if imperfect. If perfect it is binding, and therefore a trust may be created without any consideration (provided it is perfect or complete).

but not if it is imperfect.

When it is said to be perfect :—

What is a perfect conveyance :—

A. *Where the donor has both the legal (as well as the equitable ownership):—*

Where legal formalities have been omitted, it is imperfect.

(1) If there are some formalities prescribed by any law for the conveyance, and those formalities have not been fulfilled, the conveyance is imperfect.

Illustration.

A, who has certain shares in a company, transfers them to B in trust for C. The law provides that for the transfer of shares in that company, there must be an endorsement, and notice must be given to the company of such transfer within a week from the date thereof. No notice is given to the company as required by law. The conveyance is imperfect.

Where donor declares himself trustee, it is perfect.

(2) If the owner declares himself to be the trustee of the property for another, the trust is perfect, and as such binding, even if there be no consideration.

Illustration.

A promises to convey his property to trustees in trust for his daughter, and in the meantime and until such conveyance himself to hold in trust for his daughter. The trust is perfect from the date of such agreement [*Steele* v. *Walker* 28 Beav. 466].

B. *Where the donor is merely the equitable owner :—*

(3) If the donor directs trustees to hold the property in trust for another, the trust is complete. Where donor directs trustees to hold for another, or

(4) If the donor has done everything in his power to perfect the conveyanee, the trust is complete. he has done everything in his power, it is perfect.

III. FRAUDULENT AND NON-FRAUDULENT-TRUSTS.

A trust is said to be fraudulent when it is opposed to (1) Statute 13 Eliz. c. 5 ("Gifts for defrauding *creditors*"), or (2) Statute 27 Eliz. c. 4 ("Gifts for defrauding *purchasers*"), or (3) Statutes 41 and 42 Vic. c. 21 and 45 and 46 Vic. c. 43 (Bills of Sale Acts) or (4) Statute 46 and 47 Vic. c. 3 (Bankruptcy Act). When a trust is said to be fraudulent.

(1) 13 Eliz. c. 5. *

By this Act all fraudulent conveyances, alienations of lands or goods, whereby creditors may be in any wise disturbed, hindered, delayed or defrauded of their just rights are declared utterly void. But this Act does not extend to any estate or interest in lands etc. on good consideration and *bonâ fide* conveyed to a person not having notice of such fraud. Conveyances to delay or defeat creditors.

Such conveyances may be either voluntary, or for value.

A. *Voluntary conveyances.* The Statute does not make all voluntary conveyances void, but only fraudu- When voluntary.

* The Statutes 13 Eliz. c. 5 and 27 Eliz. c. 4 have been superseded by s. 53 of the Transfer of Property Act, so far as India is concerned.

lent voluntary conveyances void, if creditors are in any way prejudiced thereby. Now, what amount of indebtedness on the part of the settlor will raise this presumption of fraud? The mere fact that at the time of making the settlement the settlor was indebted will not of itself be sufficient to impeach the settlement, even if it is voluntary, for it rarely happens that a man is not indebted to some extent. On the other hand it is not necessary to show that the settlor was in hopelessly bankrupt circumstances. The true test is —whether he was at that time so largely indebted as to be already embarrassed or must have become immediately embarrassed in consequence of the settlement.

Mere indebtedness raises no presumption of fraud, but may be evidence of fraudulent intention.

Moreover, not only may the existing creditors impeach the settlement, but also those who have become creditors subsequently to the date of the settlement, if they can show that the money advanced by them has been applied or should have been applied towards the payment off of the existing creditors, in which cases they stand in the shoes of the latter.

Subsequent creditors also may impeach fraudulent settlement.

B. *Conveyances for value.* It will be noticed that *bonâ fide* transferees for good consideration without notice of the fraud are protected, so that if a conveyance is for value it satisfies one of the conditions of exemption. In such a case an express intention to defraud must be proved.

When for value:

Express intention to defraud must be proved.

(2) 27 Eliz c. 4.

This Act was designed to protect purchasers, as the former one was calculated to protect creditors.

Conveyances to defeat purchasers.

It provides that every conveyance of or charge on lands with the intent to defraud subsequent purchasers of the same lands would be void as against such purchasers.

The Statute does not declare, however, that such a conveyance is absolutely void, but that it is void as against the subsequent purchaser, and only so far as it is necessary to give full effect to such purchaser's rights. Therefore it is valid as against the grantor.

Such conveyances are valid between the parties.

The following conveyances are void under the Statute :—

(1) Conveyance for value, but made with a fraudulent intent, and

(2) Voluntary conveyance, though made without any fraudulent intent.

A voluntary conveyance was voidable at the instance of a subsequent purchaser, even in the absence of fraud.

The reason was stated to be that a subsequent transfer of the same property for value sufficiently evinces the fraudulent intention of the former transfer.

This rule applied only when the subsequent transferee claimed though the same voluntary settlor, and not from his devisee, nor from a second voluntary transferee, because in these latter cases the purchaser claimed through an (intermediate) volunteer.

This rule, harshly as it operated as regards persons taking by gift, has been modified by the *Voluntary Conveyances Act*, 1893, which provides that no voluntary conveyance, if it is *bond fide* and without any fraudulent intent, would be set aside by reason of a subsequent transfer for value.

Now modified by the Voluntary Conveyances Act.

The Act applied only in the case of lands, so that a transfer of chattels personal was not within the Statute; neither was a transfer of a leasehold within the Statute, if it was subject to rent or other onerous covenants, and the volunteer undertook to pay the rent and observe the covenants. These were, therefore, not voidable by a subsequent transfer.

'Purchaser' includes mortgagee and lessee.

'*Purchaser*.'—A mortgagee as well as a lessee would be deemed purchasers within the meaning of the Statute, but a judgment-creditor would not.

What is valuable consideration.

Valuable consideration.—Considerations are either (1) *good* or meritorious—*e. g.*, considerations of blood, natural affection or of generosity and moral duty; or (2) *valuable, e. g.*, money, marriage, or money's worth.

Marriage is a valuable consideration, if there are ante-nuptial marriage-articles.

Marriage as a valuable consideration. Before the Statute of Frauds, ante-nuptial marriage articles might have been oral, and if the marriage was solemnized afterwards, made the wife a "purchaser" within the meaning of the statute. The Statute of Frauds has not altered this principle, but has, as we have seen at page 109, provided that the marriage-articles must be in writing. So that, in order to make a marriage-settlement valid as against a subsequent purchaser, two things are necessary—

(1) The marriage-articles must be in writing, or if it is oral, it must be set out in the marriage-settlement; and

(2) The marriage must be a real consideration on the part of the wife.

Illustration.

A went through a valid ceremony of marriage with B, a woman who had previously lived in concubinage with A for a period of years. A settled considerable property on B prior to the marriage and in consideration thereof. *Held*, that the marriage being wholly illusory as a consideration, and the woman being aware of that, the settlement was void against a subsequent purchaser.

Post-nuptial marriage-settlement without ante-nuptial marriage-articles.

A marriage-settlement entered into after marriage without any ante-nuptial marriage-articles would be a mere voluntary conveyance, because the marriage, being past consideration, is no consideration.

But a very slight consideration was held sufficient to sustain such a voluntary settlement. Now, however, as we have seen above, all such voluntary conveyances are protected by the Voluntary Conveyances Act, 1893.

(3) *Bills of Sale Acts of* 1878 *and* 1882.

Bills of sale are instruments by which mortgages of goods are effected.

Bills of sale, in order to be valid against creditors, must be registered.

These Acts provide that bills of sale, in order to be valid against creditors, must be registered. But if they are not registered, they would be considered *fraudulent*, and would be available for the benefit of the general body of creditors on the grantor's insolvency, to the prejudice of the mortgagees.

(4) *Bankruptcy Act*, 18[illegible].

What conveyances must be deemed fraudulent as against the

The following conveyances are declared fraudulent by the statute:—

(1) Voluntary post-nuptial settlements are void as against the trustee in bankruptcy, (a) if made within

trustee in bankruptcy.

2 years of the bankruptcy; (b) if made within 10 years (but not within 2 years) of the bankruptcy, unless the trustees under the settlement can prove that the settlement was not, in fact, fraudulent, and that it was a *bonâ fide* one.

(2) A post-nuptial settlement on the wife and children of property which the husband had acquired in right of his wife is valid even on his bankruptcy.

(3) Even ante-nuptial settlements of property yet to be acquired are void after the husband's bankruptcy, unless such property has been actually acquired and settled before the bankruptcy.

(4) A trust in favour of a creditor, if made with the object of giving preference to that creditor, is void as against the trustee in bankruptcy, if the debtor at that time, though not actually bankrupt, is unable promptly to pay off his other debts on their falling due, or within three months of the bankruptcy.

IV. Trusts in favour of creditors.

Although voluntary conveyances are void as against creditors and purchasers, still they are valid and irrevocable as between the parties thereto; so that a simple declaration of trust in favour of a third person cannot be revoked.

A trust in favour of creditors is revocable,

But when a trust has been declared in favour of a creditor, that amounts in general to a direction to trustees as to the mode in which they are to hold the trust-property. Under such a deed, the creditor alone is the *cestui que trust*, and may vary or release

the trust at his will and pleasure. "It is, in fact, as if the debtor has delivered money to an agent to pay his creditors, and (before any payment) had recalled the money".

Nevertheless a trust in favour of creditors in irrevocable in the following cases:—

(1) If the creditor executes the deed of settlement as a party to it, he becomes the *cestui que trust* instead of the settlor, and the deed becomes irrevocable. unless the creditor is a party to the deed,

(2) If the purport of the deed is communicated to the creditor, and he shows his acquiescence in it by some conduct, *e. g.*, by forbearing to sue, or standing by till he has lost some remedy, the deed is irrevocable. or he shows his acquiescence therein by conduct.

But mere silence on the part of the creditor will not have this effect.

V. Equitable Assignments.

By the old common law, "no possibility, right, title or *thing in action*" (*or chose in action i. e.*, a debt or moveable property not in the possession of the claimant) "could be granted or assigned to strangers." But in equity all choses in action and even mere expectancies and naked possibilities, provided they were for valuable consideration, were assignable. Thus, the expectancy of an heir-at-law to the estate of his ancestor, or the legacy which a person may obtain under a will executed by a person who is yet living, or property to be acquired afterwards etc. were and are transferable. Assignment of choses in action formerly not allowed at law, but were allowed in equity.

Assignment distinguished from mandate. An assignment must be distinguished from a mere *mandate*, Assignment distinguished

from mandate: the latter is revocable, while the former is not.

which is a direction from a principal or creditor to his agent or debtor, but not communicated to the party in whose favour the mandate is given. A mandate is revocable, whereas an assignment is not.

An assignment, to be valid, must be for value, and notice must be given to the debtor, otherwise he would not be bound.

Essential of a valid assignment. *

(1) It must be for valuable consideration, and

(2) Notice must be given of the assignment to the debtor. If no such notice is given, the transaction is not invalid as between the assignor and the assignee; but the debtor would not be bound, and if he pays off the debt to the creditor in ignorance of such assignment, he would not be liable to the assignee.

Rule in *Dearle* v. *Hall.*

Notice thus perfects the title of the assignee and gives him a right *in rem* *i. e.*, it vests the property in him. This doctrine of equity is known as *the rule in Dearle* v. *Hall.*

Notice need not be formal, and in general, need not be in writing.

Form and mode of notice. Except in the case of policies of life-assurance, notice need not be formal. When the assignment operates under the Judicature Act, 1873, the notice must be in writing, though otherwise it may be informal; but in other cases it need not be in writing even.

When no notice is necessary.

Notice need not be given :—

(1) When the assignment is of shares in registered companies,

(2) When the property consists of chattels real and

* Cls. 130 of the Transfer of Property Act.

(3) When the chose in action is in court. Here, if no notice is given to the officer of the court, the assignee must obtain a stop order on the fund.

The assignee is bound by the equities *:—The assignee of a chose in action takes subject to all the equitable defences available against the assignor. Thus he cannot have a better title than what his assignor had.

The assignee takes subject to all equities affecting the subject-matter,

Illustrations.

(a) A brother, on the marriage of his sister, let her have a sum of money privately, in order that her fortune might appear as large as was insisted on by the bridegroom. The sister gave a bond to the brother to repay it. The bond is void, being opposed to public policy [see Ill. (a) p. 55]. Now the brother assigned the bond to one of his creditors. The creditor is affected by the illegality of the bond.

(b) Certain legatees, who were also the heirs of the deceased in case of his intestacy, sued the executor for a declaration that the alleged will was not genuine. Pending the action, they assigned their interest in the estate, whether as legatees or as heirs. The action was dismissed, with costs payable by the plaintiffs to the defendant executor, such costs to be set off against the legacies. The assignee took the legacies subject to such set-off.

Exceptions.—(a) *Negotiable instruments.* A *bonâ fide* assignee of a negotiable instrument is not prejudiced by defects in the title of the assignor, unless he has notice of such defects.

except negotiable instruments, debentures payable to bearer.

(b) *Debentures payable to bearer.* Debentures payable to *bearer* will bind the company issuing them in

*Cf. s. 132 of the Transfer of Property Act.

the hand of an assignee for value, irrespective of any equities subsisting between the company and the previous holder.

Illegal assignments.

Assignments which are illegal. (1) Salaries or pensions of public officers, payable to them for the purpose of keeping up the dignity of their offices and to secure a due performance of their duties, are not assignable, as being opposed to public policy. *

(2) Assignments tainted with maintenance and champerty [see page 57].

(3) Assignment of a mere naked right to litigate. †

(4) Purchase by a solicitor *pendente lite* of the subject-matter of the suit.

(5) Assignments by incapacitated persons.

MODE OF CREATING TRUSTS.

Only in the case of real estates writing is necessary.

(1) *Instrument.* By the Statute of Frauds, a trust of real estates must be in writing, signed by the party creating the trust, or by his will. But as the Statute does not apply to personal estates, a trust of personal estates may be made either by writing or by parol.

No technical words necessary.

(2) *Words.* No particular form of words is necessary; a language from which the intention to create a trust may be clearly inferred would be enough. As Lord Langdale has observed—"Where property is given absolutely to one person, and he is recommended or entreated to dispose of the property in favour of another, the recommendation or entreaty or wish will be held to create a trust, if there are "the three

* Cf. s. 6, (f) and (g) of the Transfer of Property Act. † Ibid. (e).

certainties" *i. e.*, (a) the words are imperative or certain, (b) the subject-matter of the trust is certain, and (c) the object or persons intended to be the beneficiaries are certain.

"The three certainties."

The three certainties :—

(1) *The words must be certain*, and not attended with other words depriving them of their effect. Words must be certain.

Illustrations.

(*a*) *Musoorie Bank* v. *Raynor* 4 All. 500 (P. C.). R. by his will, gave all his properties to his wife, "feeling confident that she will act justly to the children in dividing the property *when not required by her*". *Held*, the words were in the nature of an appeal to the conscience of the wife, and did not create a trust in favour of the children.

(*b*) The phrases "will or desire", "will and request", "have fullest confidence", "heartily beseech," "well know", "of course he will give," in the absence of other words of a contrary significance, were held to create a trust.

(*c*) A testator left all his properties "absolutely" to his wife, "in full confidence that she would do whatever is right with it among the children." No trust is created.

(2) *The subject matter of the recommendation must be certain*, otherwise there can be no trust. (2) The subject-matter must be certain.

Illustrations.

(*a*) A leaves his property to his wife, with a recommendation that she shall distribute among his children what shall be *left at her death*, or *what she shall die possessed of*. No trust is created, because the property which she might leave at her death is uncertain.

(*b*) *Curtis* v. *Rippon* 5 Mod. 434. The testator, after appointing his wife guardian of his children, gave all his properties

to her, "trusting that she would, in fear of God and in love t the children committed to her care, make such use of it a should be for her own and their good, always remembering th Church and the poor." *Held*, the wife was absolutely entitled.

(c) *Buggins* v. *Yates* 9 Mod. 122. A testator devised rea property to his wife, and declared he did not doubt but his wif would be *kind to his children*." *Held*, the claim was void fo uncertainty in the subject-matter.

(3) The objects must be certain.

(3) *The object i. e., the beneficiaries, must be cer tain.*

Illustration.

Sale v. *Moore* 1 Sim. 534. A testator bequeathed the residu of his property to his wife, not doubting that "she would con sider his near relations, as he would have done if he ha survived her." *Held*, the objects were uncertain, as it was no clear whether he meant relations at his own death, or at hi wife's death.

Precatory trusts :

Precatory Trusts. Mere recommendatory words will not be construed as creating a trust, in the absence of evidence showing an imperative wish.

what they mean.

A *precatory trust* arises where in substance a trust appears to be intended, though the words used are not imperative words, but words of entreaty, on the principle, that any entreaty emanating from a person in power, is sometimes a gentle form of command.

But in a precatory trust the intention to create a trust must appear. The tendency of judicial decisions is to limit the scope of precatory trusts.

Results of failure to create a trust:—

If no trust

(1) Where no trust appears to have been intended,

the donee will be beneficially entitled to the property. It would take effect as an ordinary gift.

is intended, donee takes absolutely.

(2) Where a trust was intended, but fails, the donor himself or his legal representative would be the *cestui que trust*, such trusts being known as "Resulting Trusts" [Ch. XVIII].

If a trust was intended, but fails, the trust results to the donor.

Powers in the nature of Trusts.

The language used may confer on the donee not a trust, but a *power* to dispose of the property as he thinks fit. This is a mere power, which is unenforceable. So that if the donee does not care to exercise the power, the court will not execute it. But a power may be coupled with an imperative recommendation in favour of certain specified persons or objects; it is then called *a power in the nature of a trust.* If a power in the nature of a trust is not executed by the donee of the power, the Court will execute it, dividing the property equally among all the members of the class among whom the power was to have been exercised, on the principle "Equity is equity"—although the donee of the power, if he had so chosen, might have unequally distributed it even to the total exclusion of one or more of such persons.

A mere power is unenforceable,

but a power in the nature of a trust would be enforced,

Illustration.

Burrow v. *Philcox* 5 My. and Cr. 72. The testator, after giving life-estates in certain property to his two sons, with remainder to their issue, declared that should there be no issue of either, the survivor among the sons should have the power to distribute it among the testator's nephews either all or any or as many as the surviving son shall think proper. *Held*, a

trust was created in favour of the nephews, subject to a power of selection by the surviving son.

WHETHER PURCHASER IS LIABLE TO SEE TO THE APPLICATION OF THE PURCHASE-MONEY.

Formerly a purchaser from a trustee for sale was bound to see to the application of the purchase-money.

As the *cestui que trust* was particularly favoured in equity, the old rule was that a purchaser from a trustee for sale was bound to see that the purchase-money was paid over to the *cestui que trust*, unless indeed, it was declared in the trust-deed that the trustee's receipt alone will be a valid discharge.

Rule gradually relaxed.

The rule operated very harshly on purchasers, and it came to be gradually modified by statutes.

(1) A purchaser of personal estate was not bound to see that the purchase-money was applied in the discharge of debts.

(2) A purchaser of real estate, from a trustee for sale for the payment of debts and legacies generally, was also exonerated.

(3) But where the trust was for the payment of specified debts, or of legacies only, the purchaser was not exonerated.

This latter rule has also been modified by Lord St. Leonards' Act (22 and 23 Vic. c. 35), which provides that *bonâ fide* payment by the purchaser to the trustee effectually discharges the purchaser, in the absence of anything to the contrary expressed in the instrument creating the trust.

Lord Cranworth's Act (23 and 24 Vic. c. 145) provides that the trustee's receipt shall be a valid acquittance for *any* money paid to the trustee.

The Trustee Act, 1893, the Conveyancing Act, 1881, and the Settled Land Act, 1882, made provisions to the same effect.

The result of these statutes is that a purchaser in every case is protected if he pays to the trustee and obtains a receipt from him, provided he does not knowingly participate in a fraud of the trustee's.

Now a purchaser *bonâ fide* paying the price to the trustee, and obtaining receipt from him, is safe.

The above law as to purchase from trustees applies also to executors, but not to administrators, although executors and administrators are in all other respects on an equal footing.

Formerly in the case of a purchase from a trustee, the provisions in sections 55 and 56 of the Conveyancing Act, which provides that the usual receipt-clause in the body of the deed, or the usual endorsement of such receipt on the back of the deed, would be sufficient evidence of payment, did not apply. But now it is provided by section 17 of the Trustee Act that sections 55 and 56 of the Conveyancing Act would be applicable in the case of a purchase from a trustee.

The usual receipt in the body of the deed would be enough.

CHAPTER XVII.

PUBLIC OR CHARITABLE TRUSTS.

Charitable trust defined.

Definition. A public or charitable trust is a gift for the benefit of the general public, or of an indeterminate section of the public.

Illustrations.

Thus, by the Mortmain and Charitable Uses Act 1888, every disposition of property having for its object the relief of the poor, or the promotion of education, or the advancement of Christianity, and so forth, is a charitable trust.

Enumeration in the Statute is not exhaustive.

But it was held that the enumeration of charitable trusts in the statute is not exhaustive, and objects similar to the above would be charitable—*e. g.*, repair, of monuments in Churches, foundation of lectureships, water-supply of a town, reduction of the national debt &c.

A charitable trust in the popular sense may not be so in the legal sense.

But it will be noticed that an object which is charitable in the popular sense, may not be so in the legal sense, if it is really for the benefit of individuals—*e. g.*, for the feeding and care of certain specified horses of the testator, a bequest to a private orphanage, &c.

The court usually settles a scheme for the administration of charitable trusts.

Equity's treatment of charitable trusts.

How equity treats charitable trusts :—In its treatment of charitable trusts, equity sometimes (1) favours them above private trusts, sometimes (2) treats them in the same way, (3) sometimes disfavours them in comparison with private trusts.

I. FAVOURED ABOVE PRIVATE TRUSTS.

(1). If there is an absolute intention to make a gift to charitable purposes, that intention will be effectuated, even where the settlor has left the particular object uncertain, or the object specified by him happens to be illegal. (1) Where an absolute charitable intention may be gathered, the trust is good, even if the object is uncertain.

In such a case equity does not allow the trust to fail, as in the case of a private trust (the *object* being uncertain) but executes the trust *cy pres*—i. e., as nearly as may be in conformity with the original intention of the grantor. Doctrine of *cy pres*.

But the doctrine of *cy pres* applies only where there is a *general* charitable intention, and therefore if the donor has but one particular object in his mind, *e. g.*, to found a church at a particular place, and that object cannot be effectuated, the doctrine of *cy pres* does not apply. When the doctrine is applicable.

(2) In the case of a private trust, as we have seen above, if the conveyance is imperfect, it will not be enforced in favour of a volunteer. But in the case of a charitable trust, imperfections will not be fatal, where the donor has the capacity to transfer and is entitled to the property. (2) Defects in conveyancing supplied.

(3). Where there is a general charitable intention but the object is not specified, or the specified object is not sufficient to exhaust the property, the trust property in the former case, or the residue in the latter case, does not result back to the donor as in the case of a private trust, but is applied to any object declared by the court. (3) No resulting trust.

Exception.—Where the settlor appropriates only a portion of the value to a charity, the residue results to the donor.

(4) Freedom from the rule of perpetuities.

(4). The most important characteristic of a charitable trust is that it is free from *the rule of perpetuities.*

(5) Voluntary charitable trusts are not within 27 Eliz. c. 4.

(5). Voluntary charitable trusts are not within the statute 27 Eliz. c. 4, so that, even before the Voluntary Conveyances Act, 1893, a person who purchases property with notice of a voluntary charitable trust previously created, could not avoid it.

TREATED ON THE SAME FOOTING.

(1) Want of executor supplied.

(1). Want of an executor or trustee will be supplied.

(2) Lapse of time is a bar.

(2) Lapse of time is a bar, exactly as in the case of private trusts. But in the case of a breach of an express trust by a trustee of which the purchaser has notice, lapse of time is no bar either in the case of charities or in the case of individuals. Now, under the Trustee Act, 1888, lapse of time may be pleaded in bar of an action for breach of trust, equally in the cases of private trust and in that of a charitable trust.

(3) Mixed lawful and unlawful objects.

(3). As in the case of private trust, so in that of charitable trust, if there is a combination of lawful and unlawful objects, and a separation is possible, that is to say, where the properties to be appropriated to each are ascertainable, a separation would be allowed and the legal object alone executed: otherwise the whole trust will fail.

(4) Direction

(4) When the capital has vested absolutely in the

trustees, a direction to accumulate the income would be invalid, equally in the cases of private and charitable trusts. for accumulation illegal.

DISFAVORED IN COMPARISON WITH PRIVATE TRUSTS.

(1) Assets will not be marshalled in favour of a charity in the absence of an express direction to that effect. (1) No marshalling of assets.

Illustration.

If the testator gives his real property and personalty to trustees to sell and pay his debts and legacies, and leaves the residue to a charity, equity will not marshall the assets by throwing the debts and ordinary legacies upon the real estate and thus leave the personalty for charity.

(2). Charitable trusts which are obnoxious to the public sense, whether moral or political, will not be enforced. Thus, a gift for superstitious purposes *e. g* for saying masses for the dead, are invalid. On the other hand, a private trust will be enforced, even if it is opposed to the moral sense of the country.* (2) Superstitious uses are forbidden.

* Superstitious uses are not forbidden in India.

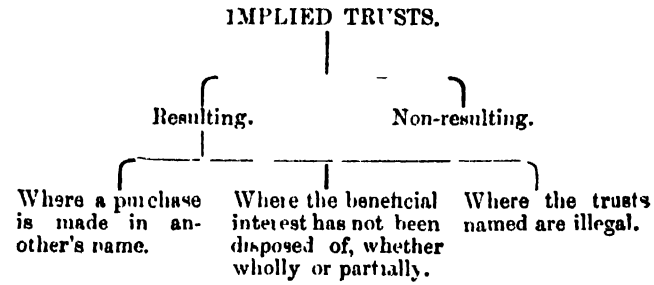
CHAPTER XVIII.

IMPLIED TRUSTS.

What is an implied trust.

Definition. An implied trust is one founded on an unexpressed but presumed intention of the party creating it.

Classification.



RESULTING TRUSTS.

(a) Where a purchase is made *benami*.

(a). Where a purchase is made in another's name. Where a person purchases property *(benami)* in another's name, the ostensible purchaser *(benamidar)* becomes a trustee for the person who has advanced the purchase-money. [Here, 'purchaser' does not include a 'lender'.]

Exceptions :—

Exception:—(1). This implied trust being based on a presumed intention, the presumption may be rebutted by giving evidence that the ostensible purchaser was intended to take beneficially by the person advancing the money.

And where the ostensible purchaser stands in a very close relation to the person paying the purchase-money, so that it is the latter's moral or legal duty to provide for the former, a contrary presumption arises, which is called *the presumption of advancement.* * In such a case the presumption will be that the person paying the purchase-money intended the transferee to take beneficially. (1) Presumption of advancement:

The presumption of advancement will arise in favour of a legitimate child as well as in favour of all persons to whom he stands in a *loco parentis*—*e. g.*, an illegitimate son, a grandchild by a deceased child a godson &c. It also arises in favour of the wife, but not in favour of a woman who is not his lawful wife, nor the illegitimate child of his daughter. where applicable.

The presumption of advancement is merely a presumption, and may be rebutted even by parol evidence. Such evidence may be either *(i)* acts of the father or husband antecedent to or contemporaneous with the purchase, or (*ii*) acts or declarations subsequent to the purchase. This presumption may be rebutted by evidence.

(i). Antecedent or comtemporaneous acts may be properly used either for the purpose of rebutting the presumption, or of affirming it.

(*ii*). Subsequent acts or declarations of the father or husband may be used against him (*i. e.*, to support the presumption), but not for him (*i. e.*, to rebut the

* The presumption of advancement does not apply to *benami* purchases in India—*Gopeekrist Gossain* v. *Gungaprosad Gossain* 6 M. I. A. 53.

presumption. Similarly, subsequent acts or declarations of the son or wife may be evidence against him or her, but not in his or her favour.

The presumption of advancement will not arise when the person advancing the money is the *mother*, and not the father, of the transferee, because the mother is under no moral duty to provide for the child.

(2) Where the policy of a statute would be nullified.

(2). Where the policy of a statute would be defeated by allowing the beneficial ownership to result to anybody but the transferee.

Illustration.

The policy of the Merchant Shipping Acts is to secure publicity to the name of the owner of a British ship by compelling registration of his name, no notice of any trust being allowed on the register. Now A purchases a British ship in the name of B. A cannot claim the ownership of the ship.

(b) Where the beneficial interest has not been disposed of.

(b) Where the beneficial interest has not been disposed of whether (i) wholly, or (ii) partially.

(*i*) Where property is given to a person, and it appears that the transferee was not intended to take beneficially, but it cannot be gathered in what way the beneficial interest is to be applied, a trust results to the donor.

Illustration.

A conveys property to B "on trust" to be declared afterwards No such declaration is ever made. The trust results to A.

(*ii*) Where a fund is given upon a particular trust and it appears that the trust is insufficient to exhaust the whole fund, the residue results to the donor or his legal representatives.

Illustration.

A conveys an estate to B on trust to pay his debts. If there is a surplus, it results to A.

'*Legal representatives*'.—If the transferor is dead and has not left a will, the real property will result to his heir, and the personalty to his next of kin. But if there is no heir, the Crown will take the real estate by escheat, and if there is no next of kin, the Crown will take the personalty by escheat as well. If he has left a will, the real estate will result to the residuary devisee, and the personalty to the residuary legatee. Who are the legal representatives.

(c) *Where the trusts declared are illegal.* If the maxim "*in pari delicto*" does not apply (see the exceptions to the maxim given at page 59), the trust results to the donor. But if the maxim applies, there is no resulting trust, and the trustee takes absolutely. (c) Where the trusts declared are illegal.

NON-RESULTING TRUSTS.

Non-resulting trusts arise out of equity's dislike to joint-tenancies, with their incident of survivorship [See page 22, Ill. (c)]. Non-resulting trusts arise out of joint-tenancies.

As equity follows the law, it cannot directly override the principle of survivorship, but takes advantage of almost any circumstance from which a tenancy-in-common can be inferred.

Where two persons purchase a property, advancing the purchase-money in equal shares, they are joint-tenants, and equity does not interfere with that. But in the following cases, the survivor, though the owner at law, is a trustee for the legal representatives of the

deceased conveyer to the extent of the latter's share :

Where two persons advance purchase-money in unequal shares, or mortgage-money, and one dies, the survivor is a trustee for the representatives of the deceased.

(*a*) Where the purchase-money has been advanced in *unequal* shares, the survivor is a trustee for the representatives of the deceased in respect of a share proportionate to the purchase-money advanced by the latter.

(*b*) Similar is the case where two persons advance money *by way of a loan*, whether *in equal or in unequal shares and take a mortgage* to themselves jointly.

(*c*) There is no survivorsip in joint-purchases by way of a trade *i. e*, for partnership purposes.

CHAPTER XIX.

CONSTRUCTIVE TRUSTS.

Constructive trust defined.

Definition. A constructive trust is a trust which is raised by *construction* of equity (like a constructive fraud—see page 53) without reference to any intention of the parties.

Comparison between implied and constructive trusts : in the latter there may be no intention of creating a trust.

Implied and Constructive Trusts compared. In an implied trust, the intention to raise a trust may be presumed, though unexpressed; and the presumption may be rebutted by evidence of an actual intention to the contrary. But, on the other hand, a constructive trust arises not by reason of any intention, but for the ends of justice, even if there is not the slightest intention to create a trust.]

Classes of such trusts. (1) Equitable lien of the vendor and of the purchaser, (2) gains of profits made by a person in a fiduciary capacity or by the holder of a limited interest, (3) allowances for permanent improvements, and (4) heir-apparent or trustee for next of kin.

EQUITABLE LIEN.

Legal lien: depends on possession.

A *legal* lien is a right to retain possession of a thing until some claim in respect of it is satisfied—*e. g.*, the lien of an unpaid vendor of goods. This lien is possessory, that is to say, may be lost when the possession of the thing is parted with.

Equitable lien is a constructive trust.

But an *equitable* lien is wholly independent of possession, and is in the nature of a constructive trust.

Equitable lien is of two kinds:—(1) that of the vendor of immovable property, and (2) that of the purchaser of immovable property.

Vendor's lien.

(1) *The vendor's lien.** When the ownership of the immovable property has passed to the purchaser before payment of the whole or a part of the purchase-money, the purchaser becomes a trustee for the vendor to the extent of the unpaid purchase-money. This lien is a charge on the property, and may be enforced against (1) the purchaser, (2) a volunteer claiming through such purchaser, and (3) the assignee in bankruptcy, but not against a transferee for value without notice of the lien.

This lien may be waived or abandoned by conduct.

* Cf. S. 55 (4) (b) of the Transfer of Property Act.

Illustrations.

(*a*) The vendor takes a personal security from the purchaser for the unpaid purchase-money, under circumstances showing that he intended to look merely to the personal credit of the purchaser. The lien is waived.

(*b*) Where the intention of the parties is that the vendor shall receive payment out of the sale-proceeds to be received by the purchaser on a re-sale or mortgage of the property, the lien is deemed to be waived, because such re-sale or mortgage is inconsistent with the continued existence of the lien.†

(2) Purchaser's lien.

(2) *The purchaser's lien.** A corresponding lien arises in favour of the purchaser for the whole or part of the purchase-money prematurely paid before delivery of possession. This lien is analogous to the vendor's lien, and subject to the same exceptions.

TRUSTS OF PROFITS MADE BY PERSONS HOLDING FIDUCIARY RELATIONS.

A person making a profit out of a position of trust, is a trustee for the profit as well.

If a person occupying a fiduciary position makes a profit by taking advantage of his position, he is a trustee in respect of such profit to the person whose trustee he is—*e. g.*, if a trustee invests the trust-money in speculation and makes profits, he is a trustee for the profits as well. The same principle is applicable to guardians, executors, partners, agents and all others standing in a fiduciary position.

Similar is the position of the holder of a limited estate. Thus if a tenant for years obtains a renewal of the lease, or a mortgagee makes an improvement

† Cf S. 55 (6) (b) of the Transfer of Property Act.

in the property, he would be a trustee in respect of the lease or of the improvement for the remainderman or the mortgagor, as the case may be, after the termination of his own interest.

ALLOWANCES OF PERMANENT IMPROVEMENTS.

Where a person, in good faith believing certain property to be his own, permanently improves the estate by making improvements thereon, the true owner, standing by, the latter would be a constructive trustee for the former to the extent of the expenditure.

Owner of estate is a trustee for the person *bonâ fide* spending money on the estate.

HEIR A TRUSTEE FOR A NEXT OF KIN.

Where a mortgagee in fee died before foreclosure, the legal estate in the mortgaged premises formerly descended, on his intestacy, to his heir; but in equity, a mortgage being considered a mere security for the mortgage-money, it descended, like personalty, to the next of kin. Thus the heir was held to be a constructive trustee for the personal representatives of the deceased mortgagee.

Heir of a deceased mortgagee is a trustee for the next of kin in respect of the mortgage-money.

CHAPTER XX.

TRUSTEES AND THEIR POSITION.

A trustee must be a person capable of holding property, and competent to contract.

Who may be a trustee. Since the trustee is to be the legal owner, he must be a person capable of holding property as well as competent to contract, otherwise he would be unable to carry out the trust or perform the obligations annexed to his ownership.

A person is said to be competent to contract who is a major and of sound mind, and not disqualified by law from entering into a contract.

Thus an infant cannot be a trustee, but an alien or a married woman may now be.

Equity never wants a trustee, but will decree the legal owner a trustee.

Equity never wants a trustee. Whenever a trust exists and there is no trustee, or the person named as trustee refuses to execute the trust, equity will decree that person a trustee in whom the legal estate is vested, since the beneficial interest will never suffer for want of a trustee. Thus if no trustee has been appointed by a testator who has declared a trust, the personal representative, in case of personal estate, and the heir or devisee, in case of real estate, are deemed trustees.

In what sense may a trustee be called a servant of the beneficiary.

Trustee, a servant in what sense. A trustee is the servant of the *cestui que trust* in the sense that the person for whom he shall be the trustee depends entirely upon the will of such *cestui que trust*, since a *cestui que trust* may assign his beneficial interest

to a stranger without the consent of the trustee. Moreover, the majority of the *cestuis que trustent* may, upon a failure of the purposes of the trust, demand back the trust fund. And any one or more of the *cestuis que trustent* may sue the trustee in order to compel him to do any particular duty, and may even have an injunction to restrain him from doing any contemplated (unauthorised) act.

Retirement of a Trustee.

A trustee is not, indeed, bound to accept a trust; but when once he has accepted it, he cannot renounce it, except by any one of the following modes:— A trustee cannot renounce after acceptance.

(1) By the sanction of the court; Exceptions.

(2) By virtue of a special power in the instrument creating the trust;

(3) By the consent of all the beneficiaries, being *sui juris*;

(4) If he is a co-trustee, he may retire, provided two trustees remain, and they, by deed, consent to his retirement.

Under the Judicial Trustees Act, 1896, a Judicial Trustee may retire on giving notice to the court and stating in such notice what arrangements have been made for the appointment of his successor.

Delegation by Trustee.

The office of a trustee being one of personal confidence, cannot be delegated, the general rule being "*delegatus non potest delegare*." But a delegation is allowed in the following cases:— The rule is, trustee cannot delegate.

Exceptions.

(1) where there is a moral necessity for it;

(2) where it is the ordinary course of business;

(3) where the instrument creating the trust so provides; and

(4) with the consent of the *cestuis que trustent*.

In those cases in which a delegation is permitted, the trustee must exercise common prudence in the selection of the agent, or in his instructions to such agent, or in his acceptance of such agent's report.

Illustrations.

(a) A trustee engages a solicitor to act as a valuer. A solicitor is not expected to be a good valuer, and the trustee must bear any loss arising from any defect in his valuation.

(b) If a trustee accepts his solicitor's recommendation of a valuer, without satisfying himself by independent enquiries that the proposed valuer is a competent person, he might be liable.

Diligence required of trustees.

As regards duties, utmost diligence is required.

(1) *As regards duties—exacta diligentia.* The utmost diligence is his only protection against liability, and no circumstance of mere hardship will excuse him. Therefore if a trustee permits the trust-fund to remain unnecessarily in the power of a third person, or mixes the trust-money with his own moneys, or parts with his exclusive control over the fund, he does so at his risk.

As regards discretions, the discretion must be properly exercised.

(2) *As regards discretions.* What a trustee will be protected from liability, if he properly exercises his discretion, using the same diligence with regard to to the trust property as he uses with regard to his own.

If the trustee has the power of investing the property, he must exercise his discretion; he must see that the security is a proper one, and that the advance does not exceed two-thirds of the value, as ascertained by the report of a competent valuer. Investment by trustee. Two-thirds limit.

If, however, the loan exceeds this two-thirds limit and a loss arises therefrom, formerly the trustee was liable for the whole, but now he would be liable only for the excess.

Formerly the rule as to the advance limit was that trustees must not advance more than two-thirds of the value of land, or one-half of the value of house-property. But now the rule is two-thirds in all cases.

Nothing will justify a dishonest exercise of this discretion. Thus if the trustee is authorised to invest in any manner he thinks fit, he cannot invest on an improper security on receiving a bribe. No dishonest exercise of discretion is permitted.

Under the Judicial Trustees Act, 1896, the court may relieve a trustee from all liability where the court is of opinion that the trustee has acted honestly and reasonably in the matter, that is to say, under such circumstances that the court would have sanctioned the breach in regard to in the first instance.

Remuneration of Trustees.

The general rule is that trustees, executors and administrators are not entitled to any allowance for their care and trouble, for they must not profit by their trust, either directly or indirectly. Trustee shall not profit by the trust.

Exceptions. They may, however, receive remuneration:—

(1) Under an express or implied provision in the trust-instrument.

(2) Under an express contract between the trustee and *cestui que trust*.

(3) Where expressly allowed by the court.

(2) Under the provisions of the Judicial Trustees Act, 1896.

(*a*) Where a person is a mere constructive trustee, by having merely invested the trust-money in a business.

Position of solicitor-trustee. (*b*) A solicitor-trustee is only entitled to his costs out of his pocket; but a solicitor-trustee who is employed by his co-trustees to defend any legal proceeding against the trustees, will be entitled to his ordinary costs.

Where the solicitor was a mortgagee, he could formerly charge for his costs out of pocket, and not for any profit-costs of the action; but now, under the Mortgagees' Legal Costs Act, 1895, he is entitled to his full profit-costs, including his negotiation-fee.

Moreover, a trustee must not make any advantage out of his trust [illegible] debt or incumbrance to which the trust [illegible] liable, for a sum less than what is actually due thereon, he cannot charge more than what he gave. If he employs the trust-money in speculations, the *cestui que trust* may, at his option, have the trust-fund replaced with interest, or with the profits made; and the trustee

cannot insist on paying interest, while retaining the profits. He cannot renew a lease in his own name for his own profit.

PURCHASE BY TRUSTEE.

Trustee is not allowed to purchase the trust-property.

A trustee for sale is absolutely incompetent to purchase the trust-estate.

Exceptions.

A trustee will not, as a general rule, be allowed to purchase the trust-estate from the *cestui que trust*, subject to the following exceptions:—

(1) If he gives a fancy-price.

(2) If the offer proceeds from the *cestui que trust*, and the trustee pays the ordinary market-price, while making the fullest disclosure.

(3) If the sale is by public auction, and the trustee has the leave of the court to bid.

(4) If the trustee is only a bare trustee, or has retired from the trust a long time ago.

POSITION OF A CONSTRUCTIVE TRUSTEE.

The position of a constructive trustee is a matter of quasi-contract.

The liability of a constructive trustee is, in general, a matter of quasi-contract only; and he is not therefore bound by many of the incidents which equity attaches to the express fiduciary relation. Thus, as we have seen at page 182, a person who has, without authority, dealt with a tenancy in other in a trade or business, is a constructive trustee, but is entitled to reasonable allowance for his labour and skill.

As regards limitation, the rule formerly was, that time would be no bar in the case of an express trust, but would be a bar in the case of a constructive trust.

Now under the Trustee Act, 1888, trustees whether express or constructive, have the full benefit of the Statute of Limitations exactly as if they were not trustees except in cases of fraud.

LIABILITY OF TRUSTEE FOR HIS CO-TRUSTEE.

Trustee is liable for his co-trustee when he leaves money in the latter's hands.

A trustee who, though not himself receiving the money, has joined his co-trustee in giving receipt, is liable for his co-trustee, if he leaves money in the hands of the recepient trustee, even though he has received nothing. Moreover, if he allows the money to remain in the hands of the receiving co-trustee for a longer period than the circumstances of the case reasonably require, he would be liable.

Case of co-executors is different.

But co-executors are generally answerable each for his own acts only, and not for the acts of the others of them, for each executor has a full and absolute control over the personal assets of the testator and is therefore competent to give a valid discharge by his separate act.

If therefore an executor joins in a receipt by his co-executor in signing a receipt, he does an unnecessary act, and is not fulfilling a duty merely as in the case of a co-trustee, and is therefore *prima facie* liable.

But this liability arises from a presumption of having received, which may be rebutted by showing that he did not, in fact, receive, or was not in a position to control the receiving executor.

If, however, the moneys though not received by the two executors, were in the control of both, each is liable.

Where a non-receiving executor is proved to have been guilty of wilful default, he would be held liable even for money which he has not received.

Contribution and Recoupment.

Where trustees are held liable for a breach of trust, the judgment would be against all of them jointly and severally, and may be executed against all or any of them. The trustee who has alone been compelled to pay under such a decree will be entitled to claim *contribution* from his co-trustees.

If one trustee is alone compelled to pay, he may have contribution.

The court will occasionally, in exceptional cases, provide in the judgment against the trustees that the innocent trustee shall be entitled to be *recouped* out of the estate of the guilty trustee the amount which he has been compelled to pay.

An innocent trustee may have recoupment.

Duties of a Trustee.

The two primary duties of a trustee are to carry out the directions of the author of the trust, and to place the trust-property in a state of security. Thus—

Trustee's duties :—

(1) He must reduce into possession all equitable claims and choses in action.

(1) reducing into possession.

(2) He must realize with all convenient speed outstanding or personal securities.

(2) realizing trust-moneys.

(3) He must invest the trust-funds in proper securities, which are enumerated by the Trustee Act 1893, *e. g.*, Government Stock of the United Kingdom or of India, Bank of England securities, the interest

(3) Investment in proper securities.

of which is guaranteed by Parliament, "real securities,"* &c.

(4) Conversion.

(4) *Duty of conversion.* Where a testator subjects the residue of his personal property to a series of limitations, such part of the residue as may be wearing out by lapse of time, as, a leasehold, must be converted into money, which ought to be placed in a state of permanent investment, in order to protect the remaindermen or reversioners. Such conversion must be made within a year of the testator's death.

A direction that the income he enjoyed *in specie* excludes a duty to convert. And the duty to convert does not arise when the trust is created by deed.

(5) Distinguishing capital from income.

(5) *Distinguishing capital from income.* Where the residue is given on a series of limitations, and the duty of conversion is excluded, the trustee must distinguish between capital and income and give to the several beneficiaries accordingly.

(6) Trustees cannot mortgage, in the absence of an express power to that effect expressed in the trust-deed. But executors stand on a different footing, for in the absence of any direction to the contrary, they may mortgage any real or personal estate which has vested in them as such for the purpose of the

what

* "Real securities" mean *mortgages* of real estates, and do not include *purchases*, because a purchase is not an investment properly so called, but an alienation out and out of the trust-funds. But the phrase includes leasehold property held for an unexpired term of 200 years, at a rent not exceeding one shilling, and not being subject to any other onerous duties.

administration—*e. g.*, for the payment of debts or legacies.

Executors have no implied authority to carry on any trade of the testator, using his estate therein, but if there is a direction to that effect in the trust-deed he may do so, and has a right to be indemnified against any personal loss to himself on account thereof. Executors cannot carry on trade.

A receiver or manager appointed by the court has a similar right of indemnity out of the estate against any personal liability.

Remedies of Cestui que Trust.

on a breach of trust.

(1) *Right of action.* The *cestui que trust* has a right of action against the trustee. This liability of the trustee is like a simple contract debt and would be barred by 6 years' limitation, except in the case of a fraud. Remedies of *cestui que trust*: — (1) Seeing the trustee.

(2) *Right of following the trust-property.* The *cestui que trust* has not only a right *in personam* against the trustee, but a right *in rem* as well, *viz.* that of following the trust-property into the hands of all persons except transferees for value without notice. Thus he may follow the property in the hands of— (2) Following trust-property.

(*a*) a volunteer, with or without notice.

(*b*) a purchaser for value having notice of the breach of trust.

(*c*) a purchaser for value, having no notice at the time of the contract of sale, but having notice before conveyance.

(3) Following property purchased with sale-proceeds.

(3) *Right of following the property into which the trust-fund has been converted.* He can also follow the property that has been purchased with the sale-proceeds, so long as it can be traced.

(4) Impounding the trustee's interest.

(4) *Impounding.* If the trustee is also one of the beneficiaries, *e. g.*, if he is a legatee as well, his interest may be *impounded*—that is to say, the court will not allow him to receive any part of the trust-fund to which he is equitably entitled until he has made good the breach of trust.

The equitable interest of a beneficiary who has participated in a breach of trust may, in a similar manner, be impounded. And this equitable right of impounding has priority over a mortgage of the beneficial interest of the *cestui que trust*, as well as over the right of his trustee in bankruptcy.

Rate of interest is 4 per cent, except in special cases.

Rate of interest. If the trustee has been guilty of undue delay in investing, he will have to pay interest at 4 per centum, but the court may, in special cases, decree a higher rate.

Bar of remedy :—

BAR OF REMEDY.

acquiescence,

(1) *Acquiescence* in breach of trust or *release*, by the *cestui que trust* with full knowledge.

concurrence,

(2) *Concurrence* of the *cestui que trust* in a breach of trust would be a good discharge to the trustee as against such concurring *cestui que trust* and all persons claiming under him. But persons under disability *e. g.*, infants and married women, even if they have concurred could proceed against the trustee,

unless they have, by their active fraud, induced the breach of trust.

(3) *Ratification*, with full knowledge, Ratification,

(4) Under the Judicial Trustees Act, 1896, the Court may relieve the trustee from liability where he has acted honestly and reasonably and ought, in justice, to be excused. and release by the court.

Accounts.

A trustee is bound to render proper accounts; but as a general rule "settled accounts" will not be re-opened, liberty being given to "surcharge and falsify" (see page 90). Accounts. Settled accounts.

Removal of Trustee.

The court has an inherent jurisdiction to remove trustees and to appoint new ones in their place where, in the opinion of the court, the interest of the beneficiaries requires it. Trustee may be removed for any just cause.

The Trustee Act, 1893, empowers the Chancery Division to appoint new trustees wherever it is inexpedient, difficult or impracticable to do otherwise.

Where there is a real difficulty to the administration of the trust, a trustee may, after giving notice to the beneficiaries, with a condition of indemnity to the court, pay the trust-fund to the court to be administered by the court. Trustee may carry the trust-fund to court.

CHAPTER XXI.

MORTGAGES.

Mortgage in law was an absolute transfer, subject to a condition of reconveyance.

Mortgage in law and in equity. A mortgage of immovable property was, at common law, effected by the debtor conveying the land to the creditor, but subject to a condition that if the debtor repaid the debt by a certain specified date stated in the deed, the creditor would re-transfer the lands to the debtor.* This right of the mortgagor to have a reconveyance by payment on or before the due date was called the right of redemption. A mortgage at common law was, therefore, an estate subject to a condition.

Right of redemption.

Now, if the specified date expired without any payment having been made, the mortgagee became the absolute owner, and the mortgagor lost all remedy, for, at common law, time was of the essence of the contract, and if there was delay even for a single day, the mortgagor was absolutely debarred of his right of redemption.

This rule, which enabled the mortgagee to become owner of that which was at first intended to be a mere security, was [illegible], which looked at the transaction from the point of the original intention of the parties. A mortgage is, in substance, a loan, together with collateral security of property

Mortgage in equity was a loan with a security.

* Cf. the "English Mortgage" of the Transfer of Property Act, S. 58 (e).

for the repayment of the loan. Th[illegible]fore the condition that the mortgagor would lose [illegible]ever the right of redemption by default on the [illegible]pcified date, was held to be in the nature of a pen[illegible] which ought to be relieved against. Thus, it w[illegible]ld, that though the mortgagor loses the *legal* [illegible] of redemption on default being made by the [illegible]late, he has still an *equitable* right of redem[illegible]on payment of the debt within a reasonable tim[illegible] interest and costs. Equity of redemption.

Though, at first, this equity of redemption was held to be a mere *equity*, *i. e.*, a mere right, yet subsequently it came to be regarded as an equitable estate *i. e.*, an interest in the land itself. This equity is an estate.

The mortgagor therefore came to be regarded as the owner in equity, and could exercise all acts of ownership over the property, subject to the rights of the mortgage.

What cannot be mortgaged. There are some species of property which cannot be mortgaged—*e. g.*, the profits of an ecclesiastical benefice; an interest in property which is subject to forfeiture on an attempt to mortgage it: the separate estate of a married woman which she is restrained from anticipating; and property [illegible]ignment of which is void on the ground of p[illegible] *with a condition of re*[illegible] in form. Unmortgageable properties.

Mortgages by companies. The conditions of a mortgage by a limited compa[illegible]re:— Conditions of mortgage by a limited company.

(1) That the company has the power of borrowing, and is not exceeding such power;

(2) That it is not borrowing for an unauthorised purpose; and

(3) That it has power to validly charge the property in question.

"Once a mortgage, always a mortgage."

"Once a mortgage, always a mortgage."—The equity of redemption was so jealously guarded by equity that it held the maxim, *modus et conventio vincunt legem* ("the agreement of the parties overrides the law") to be inapplicable to mortgages; so that a contrary maxim came to be established, *viz.*, "once a mortgage, always a mortgage." The phrase means, that an estate could not at one time be a mortgage and at another time cease to be a mortgage (by becoming the mortgagee's absolute estate) by one and the same deed; and that whatever clause or covenant there might be in the conveyance, yet if the intention of the parties was that it should be a mortgage only, equity would so construe it.

Equity would in such a case decree a reconveyance on payment of principal, interest and costs.

But the mortgagor may, *by a subsequent contract*, bar himself of the equity of redemption to the mortgagee.

Equity of redemption cannot be clogged.

Clog on the equity of redemption.—The equity of redemption also cannot be fettered with restrictive covenants.

Illustrations.

(*a*) *Noakes & Co.* v. *Rice* (1902) A. C. 24. R., a licensed victualler, mortgaged his premises, goodwill &c. to N. & Co., brewers, with a covenant that during the continuance of the term

whether the mortgage is paid off or not, B shall not use upon the premises any malt liquors except such as were purchased from N. & Co. *Held*, that the covenant is a clog on the equity of redemption, because its effect is to convert a "free" public-house into a "tied" public-house.

(*b*) A mortgaged his property to B, stipulating in the mortgage deed that A should employ B as agent in making the collections of the property, and even after the mortgage-debt is paid off. A, after redeeming the property, refuses to employ B. B cannot compel A to employ him.

A collateral advantage to the mortgagee, during the continuance of the mortgage, may be valid,

But any collateral advantage secured to the mortgagee by the mortgage-deed, during the continuance of the mortgage, is valid, if it is not a clog on the equity of redemption. But any stipulation for enjoyment of a collateral advantage after the mortgage is paid off, would terminate as soon as the mortgage is paid.

but not after it has terminated.

An agreement between a mortgagor and mortgagee which does not clog the equity of redemption is valid —*e. g.*, a right of pre-emption given to the mortgagee in case the mortgagor should proceed to sell the mortgaged property is good.

Mortgage distinguished from -

Other securities on property :—A mortgage must be distinguished from—

(1) sale with a condition of repurchase.

(1) *A sale with a condition of repurchase.* A mortgage, though in form a conveyance, is really intended to be a security for the debt, and thus it must be distinguished from a *bonâ fide* sale out and out, with a condition of repurchase by the transferor in case he pays a fixed price within a specified date.

The distinction is one of the original *intention* of the parties, and important consequences follow therefrom.

Importance of the distinction.

For, in an out and out sale with such a condition, time is of the essence of the contract, so that the option of repurchase must be exercised within the specified time, or not at all (whereas a mortgage may be redeemed even after the expiry of the due date). Moreover, if the option of repurchase is exercised after the purchaser's death, the money goes to his *real* representative (because the money is really the sale-proceeds of real property), whereas if a mortgage is redeemed after the mortgagee's death, the money goes to his *personal* representative (because the loan is repaid).

(2) *Vivum vadium.*

(2) *Vivum vadium* (a *living* pledge). In such a conveyance the morgagee is authorised to repay himself, principal and interest, out of the rents and profits. Here the mortgaged property can never be lost to the mortgagor, but after a certain time it must return to the mortgagor.*

(3) *Mortuum vadium.*

(3) *Mortuum vadium* (a *dead* pledge). Here the mortgagee is authorised to receive the rents and profits *without account*, in lieu of interest only, and the mortgage-debt may be repaid any time. †

(4) Welsh mortgage.

(4) *Welsh mortgage.* It differs from a *mortuum vadium* in that there is no express or implied contract for repayment at any time. In all other respects it is exactly similar to a *mortuum vadium.*

* This is the first form of "usufructuary mortgage" in the Transfer of Property Act. See s. 58, (d).

† This is the second form of Ibid.

In cases (2) (3) and (4) the mortgagee has no right to a foreclosure.

REDEMPTION.

Redemption may be allowed any time before foreclosure.

The right of redemption, as we have seen, subsists even after the due date has expired; but it may be lost when the mortgagee obtains from the court an order of foreclosure, or when he has sold in pursuance of a power of sale in the mortgage-deed.

All persons having an interest in the property may redeem.

Who may redeem. Any person having an interest in the equity of redemption is entitled to redeem—*e. g.*, heir, devisee, tenant for life, reversioner, remainderman, purchaser, lessee, a subsequent mortgagee and even a volunteer who claims under a deed void under 27 Eliz c. 4, &c.*

The price of redemption is principal, interests and costs.

The price of redemption. Any person offering to redeem, and entitled in this behalf, must pay the principal, interest and costs less what the mortgagee has received from the profits of the land.

"Redeem up, foreclose down."

"*Redeem up, foreclose down.*" On a mortgage, the only interest which subsists in the mortgagor is the equity of redemption, and this equity, being an estate, may be sold, or mortgaged for any number of times. The second mortgagee thus acquires the interest of the mortgagor, and stands in the mortgagor's shoes in relation to the first mortgagee. So that if there are successive mortgages on the same estate, a puisne mortgagee must, in order to obtain an absolute estate, redeem all the mortgages prior to his (because

*Cf. s. 91 of the Transfer of Property Act.

in relation to these he stands in the position of the mortgagor), and foreclose all the mortgages subsequent to his (because in relation to these he stands in the position of the mortgagee). This rule is stated in the form of a maxim "redeem up, foreclose down."

Whether notice is necessary to mortgagee.

Time for redemption. No redemption would be allowed before the time appointed in the mortgage for payment. But if the due date has expired, the mortgagee is entitled to six months' notice, or six months' interest instead. The mortgagee is bound to accept six months' interest in lieu of notice. The mortgagor, having given notice, must punctually pay at the end of the notice, otherwise the mortgagee will be entitled to a fresh notice.

MORTGAGOR—HIS RIGHTS AND DUTIES. *

Mortgagor is the owner in equity and may take profits.

(*a*) The mortgagor is the owner in equity; and if he is entitled to possession, he may sue for such possession, or for the recovery of rent, and may receive the rents and profits without account.

Waste.

(*b*) He may commit waste, provided the security does not become insufficient.

(*c*) After default he is liable to be evicted by the mortgagee, for then he is but a tenant-at-will.

Power of granting leases.

(*d*) Formerly he could not grant leases without the concurrence of the mortgagee; but if he did so, the lease was valid as against him, on the principle of estoppel, though liable to be avoided by the mortgagee.

Now the mortgagor may, without the concurrence

* Cf. S. 72 and 76 of the Transfer of Property Act.

of the mortgagee, validly grant a lease for 21 years in the case of an agricultural lease, and for 99 years in the case of a building lease, subject to certain conditions.

MORTGAGEE—HIS RIGHTS AND DUTIES. *

(1) The mortgagee is the legal owner, and is entitled to possession as such. Mortgagee is legal owner.

(2) If he takes possession, it is not as an owner, but as the agent of the mortgagee, and he is thus bound strictly to account for the rents and profits, less the expenses of collection. The account will proceed on the footing of what he has actually received, or might have received but for his wilful default, and not for the *actual value* of the land—for he is not bound to make the most of another's property. Liability to account.

He must keep the estate in necessary repairs, but may pay for the same out of surplus, and may add to the mortgage-money anything spent by him in making necessary repairs, or defending title. Repairs.

But he cannot charge anything as his own remuneration.

(3) *Right to receiver.* The prudent course for the mortgagee would be to have a receiver appointed for the mortgaged property. The mortgagee would thus have the advantages of possession without being chargeable as a mortgagee in possession. The receiver so appointed shall be an agent of the mortgagor, but independent of him. Right to have a receiver appointed.

* Cf. S. 72 and 76 of the Transfer of Property Act.

A mortgagee in possession cannot however go out of possession in order to have a receiver appointed.

Stipulation to receive less interest.

A stipulation by the mortgagee to receive interest at a rate lower than that named in the deed would be binding, if payment is promptly made thereof, but not otherwise.

Surplus after paying interest.

(5) If there is a surplus after the payment of the interest, it will go every year towards reduction of the principal.

Power of letting.

(6) Now a mortgagee in possession has the same power of creating leases as a mortgagor in possession.

(7) A mortgagee, while exercising a power of sale must not purchase himself.

Waste.

(8) A mortgagee in possession must not commit waste, but can fell timber, not being ornamental timber.

THE DOCTRINE OF NOTICE.

Notice makes a person a *mala fide* purchaser.

A person who purchases for valuable consideration after notice of a prior mortgage, takes subject to such prior claim, and is a trustee to the extent of such claim, even though he has afterwards got in the legal estate.

Registration is not constructive notice.

Registration is not constructive notice to a person who has omitted to search at a Registry Office. A person who has subsequently got his deed registered with notice of a prior unregistered deed cannot avoid the latter.

A purchaser with notice from a vendor who has purchased without notice, or a purchaser without notice from a vendor who has purchased with notice,

is protected, if such purchaser has got in the legal estate, or the best right to call for the legal estate.

Yorkshire Registry Acts.

By the Yorkshire Registry Acts, 1884, registered deeds shall have priority according to the dates of their registration, irrespective of any constructive notice, except in the case of actual notice amounting to fraud.

Notice, Actual or Constructive.

Actual notice.

Actual notice is that given by a person interested in the property, in the course of the negotiations, to a person in his official capacity. Thus vague reports from persons not interested in the property, or given to a person in his private and not in his official capacity, will not amount to actual notice. But if the knowledge, from whatever source derived, is of a kind to operate upon the mind of any man of business and to act with reference to it, then it will amount to actual notice.

Constructive notice, also called imputed notice.

"*Constructive notice* is no more than evidence of notice, the weight of the evidence being such that the court imputes to the purchaser that he has notice —whence also constructive notice has been sometimes called '*imputed* notice'."

What is constructive notice.

(1) Where a person has notice of a fact which would have led to notice of other facts, he has constructive notice of such facts—*e. g.*, notice of a deed is constructive notice of its contents.

Inquiry purposely averted.

(2) Where an enquiry is purposely averted for the purpose of avoiding notice, that is to say, when a

person had a suspicion of the truth, and a wilful determination not to learn it, he has constructive notice.

Illustrations.

(*a*) Two properties, X and Y, are both mortgaged by the same deed to A. B purchases X, with notice that the property is mortgaged to A. He has constructive notice of the mortgage on Y, since he ought to have inspected the mortgage-deed, from which he must have come to know of the incumbrance on Y.

(*b*) A lessee has constructive notice of his lessor's title, since he should have inquired into the title of his lessor before taking the lease.

Notice from occupation of a tenant.

(3) When a purchaser has notice that a tenant is in the occupation of the land, the purchaser has constructive notice of the terms of such occupation, as well as any agreement in favour of the occupying tenant for the purchase of the property.

Notice to an agent in the course of employment.

(4) Notice to an agent in the course of the agency, and within the scope of the agent's authority, is equivalent to notice to the principal, and would be binding as such, except where the agent is a party to a fraud.

The rule is the same if the contracting parties employ one common agent, like a common solicitor, for instance.

Notice to a solicitor.

As regards constructive notice through a person's solicitor, the matter must be such as the solicitor could be reasonably expected both to remember and to mention—*i. e.*, the knowledge must be so material with reference to the business in the solicitor's hands as to make it his duty to communicate to his client. Now, by the Conveyancing Act, 1882, it is provided

that a person shall not be charged with notice, actual or constructive, unless— When a person is said to have notice.

(*a*) The matter comes to his knowledge; or

(*b*) would have come to his knowledge, if reasonable enquiries had been made; or

(*c*) in the same transaction it had come to the knowledge of his solicitor or agent as such; or

(*d*) would have, in the same transaction, come to the knowledge of his solicitor or agent as such, if reasonable enquiries had been made by such solicitor or agent.

TACKING.

Where there are three mortgages over the same property, the first of which is legal, and the third mortgagee had, at the time of his mortgage, no notice of the second one, the third mortgagee could, by paying off the first one and obtaining a conveyance of the legal estate from him, unite the two securities (the first and the third ones) and insist on being paid such aggregate amount before the second mortgage is paid, so as to give the third priority over the second and thus "squeeze out" the second mortgagee. This doctrine is called *tacking*. It is based upon the principle that "where the equities are equal, the law shall prevail," for the equity of the second mortgagee being equal to that of the first (both being *bonâ fide* transferees for value), the legal title which the third mortgagee gets by paying off the first shall prevail. But if the third mortgagee had advanced the money with Tacking

notice of the second, the equities would not have been equal, and the latter will have his priority over the former. The third mortgagee will be able to tack even if he buys in the first mortgagee with notice of the second, provided he has not had such notice at the time of lending the money.

Tacking by a puisne mortgagee.

(1) *Tacking by third mortgagee.* The rule as to the tacking by a third mortgagee has been stated above.

But if A, an owner, having the legal estate in him, creates three successive (equitable) charges in favour of B, C and D respectively, he cannot, by his own voluntary act, alter the priorities between B, C and D, by transferring his legal estate to any one of them.

Tacking by a judgment-creditor.

(2) *Tacking by a judgment-creditor.* If a judgment-creditor buys in the first mortgage, he shall not be able to tack his judgment-debt to the mortgage, because a judgment-creditor has not advanced money in contemplation of that specific property, and moreover, the effect of a judgment is merely to charge the interest which the debtor has at that time.

Tacking by first mortgagee.

(3) *Tacking by first mortgagee.* If a first mortgagee advances a sum of money subsequently to a second mortgage, without having notice of the latter, he would be entitled to tack. But for this purpose the first mortgagee must have the legal estate, or the best right to call for it.

Floating security:

Floating security. A *floating security* or *floating charge* of the assets of a company is a charge on all

the properties of the company, both present and future, liberty being given to the company to sell or mortgage its properties in the ordinary course of business. what it means.

A floating charge will attach to the properties of the company which shall remain the unincumbered property of the company at the time of the realization of the security. So that a subsequent sale or mortgage of any of the properties will have priority over the floating security, unless the floating security expressly prohibits such specific mortgage, and the mortgagee has notice thereof.

(4) Where the legal estate is outstanding, the mortgages rank in order of time, so that in such a case if a puisne mortgagee pays off the first mortgagee, he cannot tack. Securities rank in order of time, when legal estate outstanding.

(5) In Building Society mortgages no tacking was formerly allowed; so that if a building society was the prior mortgagee, a puisne mortgagee could not tack by paying off the mortgage of such building society. But now the rule of tacking applies to such cases. Tacking in Building Society mortgages.

(6) Where there is a mortgage with a surety, the mortgagee advancing a further sum could tack, even as against such surety; but if the surety was a co-mortgagor, charging some of his own property as well, the mortgagee advancing to the principal mortgagor could not tack as against such surety. Mortgagee may tack against surety.

(7) If the mortgagee holds a bond-debt against the mortgagor, whether before or after the mortgage, the mortgagee cannot tack at all during the debtor's Tacking of bond-debt.

life-time, but may tack after his death as against the heir or devisee, and that only for the purpose of evading a multiplicity of suits.

Tacking is abolished in Yorkshire.

(8) By the Yorkshire Registries Act, 1884, tacking has been abolished as regards all lands in Yorkshire, and in that county securities rank according to the dates of registration.

Fraud or gross negligence of first mortgagee.

(9) The priorty of a first mortgagee may be lost by the fraud, misrepresentation or gross negligence of the prior mortgagee. Ordinary negligence will not have this effect.

CONSOLIDATION.

Consolidation.

If a person holds two different mortgages of two different properties belonging to the same mortgagor, he is placed in the same position as if the two different properties were mortgaged to him by one and the same deed for the sum total of the mortgage-moneys, so that he may refuse redemption of one of the properties unless the other one was redeemed. This is called the rule of *consolidation*, that is, the union of the two securities into one, and is based on the maxim, "he who seeks equity must do equity."

Where it applied.

This right of consolidation could not exist unless the mortgagee is the same, and the mortgagor the same, in all the mortgages. But the doctrine applies if the mortgagees were originally different, and the mortgagee of the one has purchased from the mortgagee of the other.

Consolidation and tacking distinguished:—

Consolidation and tacking distinguished.

(1) In tacking, the mortgagee has the right to throw all the debts over one and the same estate, whereas, in consolidation, the mortgagee has the right to throw all the debts on the different estates taken together.

(2) In tacking it is essential that the mortgagee has the legal estate, whereas it is not so in consolidation.

(3) Notice is fatal to tacking, whereas it is, generally speaking, immaterial in consolidation.

Illustration.

P is the owner of properties X and Y. P mortgages X to A, and then Y to B. Subsequently he mortgages Y for a second time to C. Now A purchases from B the (first) mortgage on Y, *with notice* of the second mortgage in favour of C. A may *consolidate*, that is, refuse to allow a redemption of property Y unless his mortgage-debt on property X as well was satisfied. Thus he may throw both the mortgage-moneys on property Y so as to "squeeze out" C.

Conveyaning Act, 1881. By the Conveyancing Act, 1881, consolidation has been abolished, and a mortgagor may, at his will, redeem any one mortgage without redeeming the others, except where the parties expressly exclude or vary the provisions of the Act. But this does not extend to the redemption of only one of several properties comprised in one mortgage on payment of a proportionate part of the purchase-money.

By the Conveyancing Act, tacking is abolished.

SPECIAL REMEDIES OF MORTGAGEE.

Mortgagee's remedies :— foreclosure.

(1) *Foreclosure.* On default being made by the specified date, the mortgagee has the right of foreclosure *i. e.*, barring for ever the equity of redemption of the mortgagor. In an order *nisi* for foreclosure the court grants a certain period—usually six months—to the mortgagor to pay principal, interest and costs, and directs the necessary accounts in order to ascertain what is actually due to the plaintiff. In default of payment by the specified date, the court makes an order absolute for foreclosure, whereby the mortgagor is absolutely debarred of his right of redemption.

Who must be made parties.

In a foreclosure-action the mortgagor as well as all the puisne mortgagees must be made parties. A puisne mortgagee may sue for foreclosure by making the mortgagor and all the subsequent incumbrancers parties, and if he offers to redeem the previous incumbrances (*i. e.*, "to redeem up") he must make such incumbrancers parties as well.

If a plaintiff in a redemption-action fails to redeem, his action will be dismissed with costs, which has the effect of a foreclosure absolute.

Remedy of a debenture-holder.

The remedy of a debenture-holder is to have a receiver appointed, but he may also have a winding-up order, or even a sale of the undertaking and the property of the company, provided it is a private company. If the company is a public one, *e. g.*, a railway, tramway &c., no sale can be ordered, but a receiver may be appointed.

(2) *Sale.*

Sale by the court.

(a) By the court. Under the Conveyancing Act, 1881, the court may, either in a foreclosure-action or in a redemption-action, direct a sale, upon such terms as it thinks fit.

Under power of sale.

(b) Under power of sale in the mortgage deed. Usually there is a power of sale given to the mortgagee. If such a power is exercised, the mortgagee may deduct the principal, interest and costs out of the sale-proceeds and pay over the balance to the persons entitled to redeem. If he pays the residue of the sale-proceeds under a mistake to a person not entitled to receive the same, he cannot recover it from such payee. If the sale-proceeds are insufficient, he may proceed personally against the mortgagor.

If, by the terms of the power, notice is required to be given to the mortgagor, and no such notice is given, a *bonâ fide* purchaser of the property who is ignorant of such omission would not be affected, and the remedy of the mortgagor would be to sue the mortgagee in damages; but if the purchaser has express notice of such omission, he would be liable.

Under statutory power.

(c) Under statutory power, contained in ss. 19-22 of the Conveyancing Act, 1881. By these sections it is provided that a power of sale is incident to every mortgage; but this power cannot be exercised unless—

When can it be exercised.

(*i*) At least three months' notice is given;

(*ii*) Interest is in arrear for at last two months after becoming due; or

(*iii*) There is a breach of some provision in the mortgage-deed.

A mortgagee having only an equitable estate cannot, by exercising the power of sale, convey the legal estate

Under the Lands Clauses Consolidation Act.

(c) *Under the Lands Clauses Consolidation Act*, 1845, if the mortgaged property is compulsorily acquired, compensation-money goes to the mortgagee to be applied by him like ordinary sale-proceeds.

Distress.

(3) *Distress*. When the mortgage-deed contains an attornment-clause, the mortgagee may also distrain upon the mortgaged premises all the distrainable articles, whether belonging to the mortgagor or to any other person, provided the attornment clause is registered. In order to distrain against a company which is being wound up, the leave of the court must be first obtained.

The mortgagee may pursue all his remedies concurrently. This if he obtains only part-payment on the bond, he may institute a foreclosure-suit for the balance.

But if he forecloses first, and afterwards sues on the bond or covenant, alleging that the value of the estate is not sufficient to satisfy the debt, he gives to the mortgagor a renewed right of redeeming the estate, and thereby *opens the foreclosure*.

He will also open the foreclosure if he receives any rent of the mortgaged premises after the order *nisi* for foreclosure, but before the date fixed for redemption.

Effect of limitations in the uses of the

Where, by the mortgage, the equity of redemption has been limited in a manner different from the uses subsisting in the estate prior to the mortgage, it will

follow the limitations of the original estate. Thus, if in a mortgage of the wife's estate by the husband and wife, the equity of redemption be reserved to the husband and his heirs, there shall be a resulting trust for the benefit of the wife and her heirs, because her estate is in equity considered only a security for the debt. equity of redemption.

In every case the covenant for redemption must be strictly followed.

CHAPTER XXII.

EQUITABLE MORTGAGES.

An equitable mortgage is effected by a deposit of the title-deeds of a property with the creditor, or with some third person on his behalf, with intent to create a security thereon. It may or may not be accompanied by a memorandum of the agreement in writing; a mere deposit will be sufficient to charge the property. Even where there is no writing, the mortgage will be enforced inspite of the Statute of Frauds, for it is in itself evidence of an agreement for a mortgage. Equitable mortgage by deposit of title-deeds.

Remedies of the equitable mortgagee :— Remedies of the equitable mortgagee.

(1) He is entitled to *foreclosure*.

(2) He is also entitled to sale, whether there is or is not a memorandum of the agreement in writing.

The sale will in general be permitted one month after the certificate showing the amount of what is

due; but a period of three months may occasionally be given.

Such mortgagee may, in one and the same action, ask for possession of the property, to be delivered after the order absolute for foreclosure is made.

As regards lands in Middlesex, an equitable mortgage by mere deposit need not be registered; but if the land is in Yorkshire, the equitable mortgage must be registered in accordance with the provisions of the Yorkshire Registries Act.

A mortgage by deposit will cover future advances if such was the original agreement, or if such was stipulated for at the time of making the subsequent advance.

Interim equitable mortgage

A deposit of deeds for the purpose of preparing a legal mortgage afterwards will be effectual as a valid equitable mortgage in the interval. A parol agreement to deposit the title-deeds in future does not constitute a good equitable mortgage, but will be good if made in writing, without an actual deposit.

All the title-deeds need not be deposited; it is enough if the deeds deposited are material to the title, and there was the intention of creating a security.

Mortgagee parting with title-deeds.

If the equitable mortgagee parts with the title-deeds, and thus enables the mortgagor to create a second equitable mortgage, he will be postponed to such second mortgagee

A *bonâ fide* legal mortgage will prevail

But an equitable mortgagee will be postponed to a subsequent legal mortgagee who had no notice of the previous mortgage, provided he acts honestly, and with

ordinary diligence. And the fact that the title-deeds were not in the possession of the mortgagor will in general be sufficient to impute gross negligence to such legal mortgagee, unless he has *bonâ fide* enquired for the deeds, and reasonable excuse has been given for the non-delivery of them. over an equitable mortgage.

CHAPTER XXIII.

PLEDGES AND MORTGAGES OF CHATTELS.

A *mortgage* of personal property is a transfer of the ownership of the chattels, subject to the equity of redemption, the possession of the property remaining with the mortgagor. Mortgage of chattels.

A *pledge* of personal property passes only the possession to the pledgee, with a right of retainer till the debt is paid of. Pledge of chattels.

Remedies:—

(*a*) *Redemption.* When a time is fixed for redemption, and that time expires, the pledgor or mortgagor may redeem afterwards within a reasonable time. Redemption.

But if no time has been fixed, the pledgee has his whole life to redeem.

(*b*) *Sale.* The pledgee or mortgagee may, after the period of redemption has expired, on giving due notice sell the property without an order from the court. Sale.

Mortgage of realty distinguished from a mortgage or pledge of personalty :—

Mortgage of realty compared with pledge of personalty.

(1) After default a mortgagee of the latter need not foreclose, but may sell on giving notice.

(2) Before default, the pledgee may sell or sub-pledge, and thereby bind the pledgor, in the case of a negotiable instrument; but if the instrument is non-negotiable, the pledgor is bound only to the extent of the pledgee's right.

(3) If the pledgee makes further advances, he is entitled to tack them to the original debt, even without any distinct proof of any contract to that effect.

Surplus sale proceeds.

If on a sale there is a surplus after satisfying the pledge, the pledgee may, on the pledgor's insolvency, retain the surplus to pay off a subsequent judgment-debt of his own. This right is a right of retention or set-off, and not of tacking, and is available only on an insolvency.

By the provisions of the Factors Act, and of the Sale of Goods Act, factors for sale may make valid pledges to *bonâ fide* lenders.

Mortgages of chattels must be registered, but pledges need not.

(4) Mortgages of personal chattels must be in accordance with the Bills of Sale Acts, and must therefore be registered within 7 days of execution, but a pledge need not be. If any formality of the Act is not observed, the mortgage is void as against other registered bills of sale, and even as between the parties to the bill.

Mortgages of ships

Mortgages of ships. A mortgage of a British ship must be in the form prescribed by Merchant Shipping

Act, 1894, and must be registered by the Registrar of shipping. Such a mortgage need not be registered under the Bills of Sale Acts. must be registered.

A registered mortgagee has an absolute power of disposition, and may take possession of it, and also use it. But until he takes such possession, the mortgagor remains the owner. Their incidents.

An unregistered mortgage of a ship is valid between the parties, and as against all persons (including the trustee in bankruptcy) other than a subsequent mortgagee or purchaser duly registered. The Act also provides that all equities may be enforced against mortgagees of ships, just as against mortgagees of other personal chattels.

CHAPTER XXIV.

INFANTS.

Classes of guardians. (1) *Natural guardian.* The father is the natural guardian of his legitimate infant children, but the court may give the custody of a child under 16 years to the mother, if that is for the benefit of the child. After the father's death the mother becomes the natural guardian of the child, jointly with the testamentary guardian (if any) appointed by the father, or a guardian appointed by the court. Natural guardian *e. g.*, a parent.

The mother is the natural guardian of her infant illegitimate children.

Guardian appointed by deed or will.

(2) *Testamentary guardian.* The father may by deed, or by will (unless he is a minor) appoint a guardian.

The mother may also, by will, appoint a guardian of her children to act after her own death and that of the father; and such guardian will act jointly with any guardian appointed by the father

Guardian appointed by a stranger, who stands in the father's position.

(3) *Guardian appointed by a stranger.* Where the father has waived his natural right of guardianship in favour of a stranger, who has provided for the maintenance and education of the child, such stranger may appoint a guardian, and the father will be restrained from interfering with his guardianship, to the prejudice of the child.

Guardian appointed by court.

(4) *Guardian appointed by the court.* The Court of Chancery may, as representing the Crown's prerogative of *parens patriæ*, appoint or remove a guardian of an infant.

Ward of Court.

Ward of Court An infant becomes a ward of court when the court appoints a guardian of his person and property. But none can become a ward of court unless he has some property, for the court cannot exercise its jurisdiction usefully, unless there is property which can be applied to the maintenance of the child. Now, by the Prevention of Cruelty to Children Act, children will be protected even when they have no property.

must have property.

The court has control over father.

Control over father. The father is generally left alone in his guardianship of his children, because the

law presumes that the father has both the inclination and the capacity to do what is best for the child. and may even remove him, if a strong case is made out.

But the court has an undoubted jurisdiction to remove even the father from the guardianship if a strong case is made out—*e. g.*, that he is habitually guilty of cruelty to his children, or neglects their maintenance and education, or is bringing them up in a way contrary to good morals and religion. The danger to the child must be both proximate and serious in order to induce the court to interfere in such a case. The court more frequently removes other guardians

Powers and duties of guardians. (1) The guardian regulates the mode and the place of education of the ward; but he must bring up the ward in the religious persuasion of the father, unless the father has directed otherwise. Guardian selects mode and place of education.

(2) If the guardian wants to take the ward out of the jurisdiction of the court, he must give security.

(3) The guardian may receive the rents and profits of the ward's estate, but cannot change personal property into real property and *vice versâ*, unless with the leave of the court, because such conversion may affect the rights of the infant's representatives, if he dies under age. Guardian may receive income of property, but cannot convert, except with the leave of the court.

Ward of Court.

(1) *Marriage.* A ward of court must not marry without the sanction of the court, even where the ward has a parent (*e. g.*, a mother) living, and he or she consents to such marriage. All persons aiding A Ward of Court cannot be married without leave of court.

and abetting such a marriage will be guilty of contempt of court.

A guardian may be required to enter into a recognizance that the ward shall not marry without the leave of the court.

When the court has reason to believe that an improper marriage is about to be entered into, it may, by injunction, restrain such marriage, and prevent all communications between the bridgroom and the bride.

On an intended marriage of a ward, the court would ascertain the propriety of the marriage, and would decree a proper settlement.

By the Infants' Settlement Act, 1855, an infant not being under 20 years of age if a male, or 17 years if a female, may, with the permission of the court, make a settlement, which will be as valid and binding as if he or she were of full age.

Father ordinarily bound to maintain the child.

(2) *Maintenance.* The father is ordinarily bound to maintain the children, and he will not have an allowance out of the children's property for that purpose. But where the father is too poor to give the child a suitable education, he might have an allowance from the child's property.

In regulating the allowance, regard will be had to the income of the child's property, the estate and condition of the family, or the distressed condition of the parents. In such a case the father will not be asked to account or refund, if the child is being suitably maintained.

CHAPTER XXV.

LUNATICS, IDIOTS, etc.

Jurisdiction in lunacy.

The jurisdiction in lunacy was originally vested in the Court of Exchequer on its revenue side, from which it was early transferred to the Chancellor, and then to the Chancellor and the Lords Justices concurrently. The Judicature Act has left untouched this jurisdiction of the Lords Justices in lunacy; and from their decision an appeal lies to the Court of Appeal.

Court of Lunacy.

Equity has therefore no jurisdiction over lunatics as such, as over infants—a lunatic being placed under the care of a committee, who is, unlike a guardian in infancy, an officer, not of the Court of Chancery, but of the Court of Lunacy. Equity thus exercises jurisdiction, not by reason of lunacy, but inspite of it, when the subject-matter is a trust or a mortgage for instance.

Lunatic's maintenance would prevail over creditors as well as over the trustee in bankruptcy.

Lunatic's maintenance. As regards the maintenance of a lunatic, the court follows the law, in holding the lunatic's estate liable for necessaries supplied to him. But as regards matters falling within its own exclusive jurisdiction, the Court in Lunacy acts very much according to its own discretion. Thus the rights of the creditors are subject to the needs of the lunatic, so that they cannot proceed against the properties unless sufficient is left for his maintenance. And if the

lunatic becomes bankrupt, his property vests in the trustee in bankruptcy, subject to his maintenance.

Next of kin sometimes maintained.

The next of kin. If the property is large, the court will make an allowance for the direct benefit of the lunatic's next of kin, and thus indirectly to benefit the lunatic himself.

Conversion is not ordinarily allowed.

Conversion. The court will not generally allow a conversion of the lunatic's property, so as to affect the state of the rights of his representatives; but where it is for the benefit of the lunatic himself—solely having regard to the interests of the lunatic—the court may order a conversion. But the court usually protects the rights of the lunatic's representatives.

Chancery Court has no jurisdiction over a lunatic not so found.

Lunatic, not so found. The Chancery Court has no jurisdiction as such over a person not found to be a lunatic, unless there are trusts to execute or the fund has been paid to the Court of Chancery, in which case that court assumes jurisdiction over the lunatic and his estate.

Under the Lunacy Act, 1890, application may be made to the Master in Lunacy for directions as to the management and administration of the property of a person of unsound mind not so found.

CHAPTER XXVI.

LIENS.

A lien is a passive right of retainer of a thing without any active right, until some claim in respect of it is satisfied. 'Lien' defined.

Classes of liens.

Lien on goods is either particular, or general.

(1). *On goods*

(a) A *particular* lien, which is confined to the particular charge.

(b). A *general* lien, which extends to the general balance of accounts.

Lien on lands.

(2). *On land* Where possession is delivered to to the purchaser before payment of the whole or a portion of the purchase-money, the vendor has an equitable lien on the property (see page 175).

Solicitor's lien on deeds,

(3). *Solicitor's lien.*

(a). On deeds and papers. This lien does not depend on contract. It is merely an equitable right to negatively withhold the deeds, books and papers from the client until the bill is paid. In order that the lien may arise, the deeds must have been delivered to him as solicitor, and not otherwise; and the lien is for costs only, and not for debts.

as well as on money.

(b) On fund realized in a suit. This is a lien which may be actively enforced.

Banker's lien.

(4) *Banker's lien* on security deposited by the customer, extending to the general balance of account.

Joint-tenant's lien for costs of renewing lease.

(5) *Joint-tenant's lien* for costs of renewing lease If there are two joint-tenants, and one of them renews a lease for the benefit of both, he will have a lien on the moiety of the other lessee.

Company's lien on the share of a member.

(*b*) *Lien of Company.* A limited company may, by virtue of its articles of association, have a lien on the share of a member for any debt or liability of the member to the company.

CHAPTER XXVII.

PENALTIES AND FORFEITURES.

I. PENALTIES.

Penalty: what it means.

Wherever a penalty or forfeiture clause is inserted merely to secure the performance of some act or the enjoyment of some benefit, the performance of such act is the principal intention of the parties, and the penalty or forfeiture is merely accessory thereto.

Based on the maxim "equity looks to the intent rather than to the form."

As equity looks to the intent rather than to the form, it will relieve against the penalty, and direct the party in default to pay reasonable compensation [see page 23, Ill. (*b*)].

Illustration.

A promises to pay Rs. 1,000 to B within a year, with a stipulation that he will be relieved from all liability if he pays Rs. 500 within six months. Here the promise to pay Rs. 500 is in the nature of a penalty, and even after the specified date has expired, equity will relieve A against the penalty if he pays Rs. 500 with reasonable compensation for the delay.

A promise with a penalty may be specifically enforced.

A penalty-clause being thus neglected in equity, a promisor will not be excused from performing the act even if he is prepared to pay the penalty.

Illustration.

A promises to convey certain lands to B, and in default to pay Rs. 1,000 to B. A refuses to convey, and wants to be relieved of the contract on payment of Rs. 1,000. B may sue for specific performance.

But not when the promisor is intended to have a choice of two things.

But when, by the agreement, the promisor has the choice of doing either of two things, for one of which he will have to pay more than for the other, it is not a case of penalty.

Illustration.

If a landlord lets a house at a certain rent, and the tenant covenants that if he uses the premises as a hotel he shall pay higher rent, the additional rent is not to be taken as a penalty.

Penalty and liquidated damages distinguished.

Distinction between penalty and liquidated damages. The question often arises, as to whether a particular sum named in the agreement to be paid if a certain condition be broken is a penalty, or *liquidated damages*, *i.e.*, a reasonable compensation for the injury which the parties have *bonâ fide* estimated as likely to arise from the breach in question. Liquidated damages would be enforced, but a penalty would not. With respect to the distinction between the two, the following rules must be observed:—

How to distinguish between the two.

(1) where the payment of a smaller sum is secured by a larger, the latter is a penalty.

(2) where in an agreement a person promises to do several acts, and one and the same sum is made payable for *all* or *any* of the stipulations that sum is, in general, a penalty.

Illustration.

A promises to sing at B's theatre for a term, the contract stipulating that A shall be liable to pay Rs. 1000 for his absence from *all* or *any one* of such performances. This is a penalty.

Exception. But where the payment stipulated for is proportioned to the particular breach, and specially if it is expressed in the contract that the payment is to bear interest from the date of such breach, it will be liquidated damages.

(3) Where there is only one event on which the money is to become payable, and there is no means of ascertaining the damages resulting to the promisee from the breach, it will be liquidated damages.

The mere use of either phrase "penalty," or "liquidated damages" is not conclusive; and in case of an ambiguity equity leans towards construing the sum as a penalty.

II FORFEITURES.

Similarly forfeitures are, in general, relieved against.

The same principles govern the court in relieving against forfeitures, other than forfeitures arising under wills and settlements, leases and other strict contracts.

Forfeiture for non-payment of rent.

Forfeiture in leases Even in the case of a lease, equity would grant relief in the matter of a forfeiture for non-payment of rent. But no relief will be given after re-entry by the landlord.

Forfeiture on other grounds.

Now, by the Conveyancing Act, 1881 and 1882, the High Court is empowered generally to grant relief between lessor and lessee, and between lessor and under-lessee, upon equitable terms and on paying to the lessor all costs and expenses, in all cases, except—

Exceptions.

(*a*) The covenant not to assign or underlet.

(*b*) The covenant of forfeiture on bankruptcy.

(*c*) The covenant in a mining lease for inspection by the lessor.

But an innocent under-lessee may be relieved against any forfeiture for underletting.

Forfeiture in other strict contracts.

Forfeiture in other strict contracts, for instance, tenures. In such cases the court has no doubt jurisdiction to grant relief against the forfeiture, but it will do so only in exceptional cases.

CHAPTER XXVIII.

ELECTION.

What is an election.

Where a person grants his own property (named X) to A, and by the same instrument grants to B a property (named Y) belonging to A, whether believing the latter property to be his own or not, a case of election arises; A is "put to his election", that is to say, is required by law to decide whether he will elect in favour of the instrument, or against the instrument. If he elects in favour of the instrument, he will get property X, but must relinquish property Y (which belongs to him) in favour of B. If he elects against the instrument, he will, of course, retain his own property Y, but must relinquish property X, from which B will be compensated to the extent of the value of property Y, which has been attempted to be given over to him. If there is a residue after satisfying B it will revert to A.

Based on an equitable principle.

The principle of election is that he who accepts a benefit under a deed or will, must accept it as a whole, conforming to all its provisions, and giving up every right inconsistent with it. In other words, election originates in two inconsistent alternative rights where there is an intention, express or implied, that both shall not be enjoyed. In a case where a person disposes of property not his own, and at the same time gives to the owner of the property a benefit, there is a presumed intention that one shall

be a substitute for the other, and shall take effect as a whole The donee is put to his election, for he who seeks equity must do equity.

Definition.

Election has therefore been defined as choosing between two rights when there is a clear intention that both were not intended to be enjoyed." The intention, as we have seen, need not be express; it is presumed in the absence of anything to the contrary.

Difference from Roman Law.

The doctrine of election, is derived from the Roman law, with this difference, that in Roman law a case of election arose only when the donor disposed of property belonging to another, knowing it to belong to such other: for if a gift was made under the mistake that it belonged to the donor, the gift was invalid But in English law it is wholly immaterial whether the donor knows it to belong to another or not.

The donee may either ratify it or dissent from it.

Option of the donee. The donee, as we have seen, may—

(1) elect in favour of the instrument, that is to say, accept the gift and relinquish his own property in favour of such other person to whom it has been given, or

(2) elect against the instrument, that is to say, insist on retaining his own property; in which case the gift to him would be sequestered, and out of it compensation would be given to the disappointed transferee, so far as such property will go, and the surplus, if any, will revert to the elector. It will be noticed that election against the instrument would

In the latter case there would be no

not give rise to forfeiture, but to compensation out of the property. * Forfeiture.

Illustration.

A testator bequeaths his own property named X to B, and by the same will bequeaths B's property named Y to C. B elects against the instrument, *i. e.*, chooses to retain Y. Here C will receive the value of property Y from property X, and if there is a surplus, it will go to B.

Conditions of election — When does a case of election arise.

(1) Property which belongs to A must be given over to B by the donor.

(2) The donor must, at the same time, grant some property of his own to A.

No election. (1) Where the donor grants two properties of *his own* by the same instrument, no case of election arises Where no election.

(2) Where the donor does not give some property *of his own* to the owner of the other property, no case of election arises.

CASES OF ELECTION UNDER POWERS.

The law on this head may be summarised as follows :—

I. Where, under a power, an appointment is made to a stranger to the power, and by the same instrument some benefit is given to the person entitled in Election by person entitled in default of appointment.

* Under S. 35 of the Transfer of Property Act, as well as under S. 167-177 of the Indian Succession Act, under such circumstances the donee forfeits the gift, which thereby returns to the donor, subject to making compensation to the disappointed transferee in certain cases.

default of appointment, the latter is put to his election.

Illustration.

A fund is given to A with a power to appoint to X, Y and Z, and in default of such appointment, to B. A appoints to P, a stranger to the power. The appointment is invalid, and the fund will go to B as if there had been no appointment. But if A, by the same instrument, granted a property of his own to B, B would be put to his election as to whether to ratify such appointment or not.

No election by an object of the power.

II. Where an appointment is made to a stranger to a power, and by the same instrument a benefit is given to an object of the power, the latter is not put to his election.

Illustration.

If, in the above illustration, A appoints to P, a stranger to the power, and by the same instrument grants a property of his own to X, X is not put to his election, because no property of X has been given to P, in as much as, until an appointment in his favour, the fund does not belong to X.

Absolute appointment, coupled with a modification.

III. Where there is an absolute appointment by will, coupled with a modification, the modification being such as the law will not allow, *e. g.*, when it intringes the rule against perpetuities, no case of election is raised. But if the modification is not contrary to law, a case of election may be raised.

Where donor has no power of disposition.—Cases of election may sometimes arise, where the donor has not the legal capacity to dispose.

Cases of election where donor is an infant,

(*a*) *Infancy.* If an infant grants his own property to A, and grants A's property to B, the deed is ineffectual, and no case of election arises.

or a married woman,

(*b*) *Coverture.* Prior to the Married Women's Property Act, a married woman being incompetent to transfer, could not raise a case of election. Even now she can raise a case of election only under exceptional circumstances.

or where will is insufficiently attested,

(*c*) Prior to the Wills Act, 1837, if a will was not sufficiently attested to pass freeholds, the heir was not bound to elect. But if a properly attested will attempted to dispose of after-acquired property (which was then invalid), the heir was put to his election.

or in cases of dower,

(*d*) *Election in respect of dower.* Where the Dower Act, 1833, did not apply, that is to say, in the case of widows married in or before the year 1833, a widow might have been put to her election at law by express words only, and in equity, by necessary implication, when it clearly appeared that the intention of the donor was to exclude her from the dower.' But this intention would not have been implied, unless the instrument contained provisions which were essentially inconsistent with her right to dower.

Now, by the Dower Act, 1833, any gifts of the testator's whole property altogether defeats her claim of dower, without giving her any option to elect.

or in cases of derivative interest.

(*e*) *Derivative interest.* Where a person is derivatively entitled under another who has already elected against the instrument, the former need not elect.

But where there has been no such election by the predecessor-in-interest, the person derivatively entitled must elect.

Instrument of election :— married woman,

Mode of election. (1) *Married woman.* A married woman may elect by deed, in the case of realty, but in the case of money, the court will usually direct an enquiry, as to which of the two courses would be the more beneficial, and the woman must elect within a reasonable time after such enquiry.

But with respect to her separate property a married woman has the same power of election as a male

infant,

(2) *Infant.* In some cases, election by an infant may be deferred until he comes of age; but in most cases the court will direct an enquiry and elect on the result of such enquiry.

or a lunatic.

(3) *Lunatic.* In the case of a lunatic, on the other hand, election will not be postponed till the lunatic becomes sane; but the practice is to refer the matter to the Master in Lunacy, and the court will elect on the result of an enquiry by him.

The elector may enquire into the value of the properties.

Rights of the elector. Before election, the person compelled to elect is entitled to enquire into the valuation of the two properties. An election made under a mistake of fact is not binding.

Election may also be determined by conduct.

Election by conduct. Election need not be by express words; it may be by conduct as well. For instance, where a person put to his election has long enjoyed the property granted to him, knowing of his duty to elect, he will be deemed to have elected in favour of the instrument. What amounts to an election by

conduct is, in each case, a question of fact: no hard and fast rule can be laid down as to the precise period of time after which an election against the instrument would not be permissible.*

CHAPTER XXIX.

PERFORMANCE.

What is performance.

The doctrine of performance is based on the maxim, "Equity imputes an intention to fulfil an obligation." Where a man covenants to perform a certain act, and he does something which may reasonably be taken as a performance of the covenant, he will be taken to have done it with the intention of performing the covenant.

Two classes of cases.

There are two classes of cases in which the question of performance arises:—(1) where there is a covenant to purchase and settle lands on a person, and a purchase is afterwards made, but no settlement is made; and (2) where there is a covenant to leave property to a person, and the covenantor dies intestate, and a portion of his personal estate comes to such person under the Statute of Distributions.

Performance of a covenant to purchase and settle lands.

I. Covenant to purchase and settle lands. In *Lechmere* v. *Earl of Carlisle*, Lord L., upon his marriage with Lady C., covenanted to lay out, within one

*The Indian Succession Act, S. 174 as well as the Transfer of Property Act, S. 35, have cut the gordian knot with a sword by providing that two years' enjoyment of the gift or legacy would raise a presumption of election in favour of the instrument.

year of his marriage, £30,000 in the purchase of freehold lands in possession, to be settled on himself for life, with remainder to his wife. Lord L. was at the date of his marriage, seized of certain lands in fee; and that after the marriage he purchased certain other estates in fee-simple of about £500 per annum, together with other estates for life and in reversion. *Held*, that the purchase of lands in fee, of the value of £500, was a part-performance of the covenant, but the other properties not being in fee, could not be so treated; and the following rules were laid down:—

Lechmere v. Carlisle.

Rules laid down therein.

(1) Where the lands are of less value than the lands contracted to be sold and settled, they will be taken to be a part-performance.

(2) Where the covenant relates to a future purchase of lands, those lands which the covenantor is already seized of at the date of the covenant are not to be taken as part-performance.

(3) Where the lands purchased are of a different nature, they will not be taken as part-performance—e. g, the estates for life and in reversion in the above illustration.

(4) Although it is covenanted that the money shall be paid over to trustees to be laid by them in such purchase, the absence of the trustees' consent would be immaterial.

A covenant to settle lands creates a mere specialty debt, and not a lien on the lands, so that a purchaser, or mortgagee of the lands, even with notice, shall not be bound thereby.

II. Covenant to leave by will. Where a person covenants to leave his widow a sum of money by his will, but afterwards dies intestate, so that the wife inherits a half or a third of his personal property under the Statute of Distributions, the question arises as to whether the widow can claim both the share and the money under the covenant, or whether the inheritance is a performance of the covenant. Covenant to leave by will.

(1) If the husband dies prior to the time named for performance of the covenant, the inheritance is taken to be a performance of the covenant, so far as it will go; because there has been no breach of the covenant, and the husband *leaves* property to the wife, as he has promised to do.

(2) Where the husband dies after the expiry of the time named for performance of the obligation, the widow's share is not to be taken as a performance of the covenant, and she is entitled to claim both; because there was a breach of the covenant before the death, and from the date of such breach a debt accrues.

CHAPTER XXX.

SATISFACTION.

Satisfaction distinguished from performance.

Satisfaction is, like performance, based on a presumed intention to fulfil an obligation; but whereas in performance the *identical* act covenanted for is supposed to have been done, in satisfaction the act done is something different from the act covenanted and is a *substitute* for it.

Cases of satisfaction may be grouped under four heads, viz.—(1) satisfaction of debts by legacies; (2) of legacies by debts; (3) of legacies by portions, and (4) of portions by legacies.

Satisfaction of debts by legacies.

(1) **Debts by legacies.** The general rule is, that if a person grants a legacy to his creditor, not taking any notice of the debt at all, the legacy being of equal or greater amount than the debt, the legacy will be deemed a satisfaction of the debt, on the principle that a man is presumed to be just before he is generous.

The court leans against the presumption of satisfaction.

But the court leans against the presumption of satisfaction, and in the following cases the doctrine of satisfaction does not apply:—

Cases where the doctrine does not apply.

(1) Where the legacy is less than the debt, it will not be taken to be a satisfaction, even *pro tanto*. But if the legacy be equal to, or greater than the debt, it will be satisfaction of the latter. Where the debt is

equal to the legacy, and the debt is paid before the testator's death, the legacy is adeemed (discharged).

(2) Where the debt is contracted after the will naming the legacy, the legacy will not be taken to be a satisfaction, because the testator cannot be presumed to have, by his will, intended to discharge a debt not then in existence.

(3) Equity will also lay hold of slight circumstances showing that the legacy was not intended to have been a satisfaction; thus

(a) Where the will contains an express direction for the payment of debts and legacies, or of debts only, there would be no satisfaction.

(b) Where the legacy is made payable after debt, there would be no satisfaction.

But when it is payable before the debt, there would be a satisfaction.

(c) Where the legacy is of the residue of the estate, or otherwise uncertain or contingent, there would be no satisfaction.

[In Roman law a payment was called *less* than another, when it was less (a) in quantity; (b) in convenience of place; (c) in time, and (d) in quality. So that, using the term *less* in the sense familiar to the Roman law, all the above cases may be stated in only one rule, viz., that there shall be no satisfaction where the legacy is less than the debt.]

There shall be no satisfaction where legacy is *less* than the debt.

II. Of legacies by subsequent legacies.*

Satisfaction of legacies

* As to the rules of construction where two legacies are given to one and the same person, see, s. 88 of the Indian Succession Act, which reproduces the rules of equity given here.

by subsequent legacies, whether under the same instrument or under different instruments.

A. *Under the same instrument, i.e., same will or same codicil.*

(1) Where the two legacies are of equal amount, or of practically equal amount, though with small differences, the legacies are *substitutive*, that is, the legatee may claim only one such amount.

(2) Where the two legacies are of unequal amount, the legacies are *cumulative*, that is, the legatee may claim both.

B. *Under different instruments, that is, by the will and a codicil, or by different codicils.*

The two legacies, whether of equal or of unequal amount, will be taken to be cumulative.

But where the legacies are of equal amount, and the same motive is expressed in the two instruments for the two legacies, the legacies are substitutive.

Extrinsic evidence is admissible to support the will, that is, to establish that the legacies are cumulative, where the court raises the presumption of satisfaction. But such evidence is not admissible to contradict the will, that is, to show that the testator intended the legacies to be substitutive, where the court does not raise the presumption of satisfaction.

Satisfaction of legacies by portions.

III. Of legacies by portions. A *portion* means a sum of money to establish a child in life.

Where a father gives a legacy to a child, and afterwards gives him a portion, the portion is a satisfaction of the legacy.

IV. Of portions by legacies. Where a father agrees to make some provision for a child, and afterwards grants him a legacy, the legacy discharges the agreement for portion. Satisfaction of portions by legacies.

(1) The foundation of these two rules (III and IV.) is the parental relation, or its equivalent; thus— Rules in the above two cases.

(a) The doctrine does not apply to the case of a stranger, in whose case there would be no satisfaction. He would be entitled to claim both. No satisfaction where donee is a stranger,

But where the legacy is given to a stranger for a specified purpose, and afterwards an advance is made for the same purpose, there shall be no satisfaction.

Where a legacy is given to a mixed class of children and strangers, and the children's legacies are afterwards satisfied by portions, such satisfaction of the children's shares would not increase the strangers' shares. or an illegitimate child.

(b) An illegitimate child is a stranger in the eye of the law, within the meaning of the above rule.

(c) But if the testator stands in *loco parentis* to the legatee (including an illegitimate child), there shall be a satisfaction of the legacy by the advancement and *vice versa*.

(2) Although in the case of a satifaction of a debt by a legacy, the court, as we have seen at page 234, leans against the presumption of satisfaction, still in the case of satisfaction of a portion by a legacy and *vice versa* the presumption is reversed, that is to say, the court will presume that there has been a satisfaction. So that the presumption of satisfaction in these Where the presumption of satisfaction is raised.

latter cases is not rebutted by slight differences of amount, or of the time for payment of either. The same principle is applicable where the settlement comes before the will; but as a person claiming under a will is in the position of a quasi-purchaser, he has a right to elect between the settlement and the will.

(3) The question of satisfaction does not arise as regards advances *actually* made or property actually transferred under a settlement, but only with respect to advances or property agreed to be made or transferred.

Special appointment to one of a class, after general appointment to all.

(4) Where, under a special power, an appointment is made by will to all the members of a class, and afterwards an appointment is made by will to a particular member of the class, there is no satisfaction; such person will share also equally with the other members of the class.

(5) If the second sum is less than the previous one, there shall be a satisfaction *pro tanto* and not a complete satisfaction.

Advancement on marriage is a satisfaction of a debt.

(6) Where a parent or husband gives a legacy to his child or wife (as the case may be), to whom he is already indebted, the legacy would operate as a satisfaction only when it would so operate in the case of strangers. And an advancement made upon the marriage of the child would be considered as a satisfaction of the debt.

Child must bring into hotchpot a debt released

(7) Where a child owes a debt to the father, and the father afterwards releases the debt and dies intestate, the court considers that to the amount of the debt so

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